

San Francisco Law Library

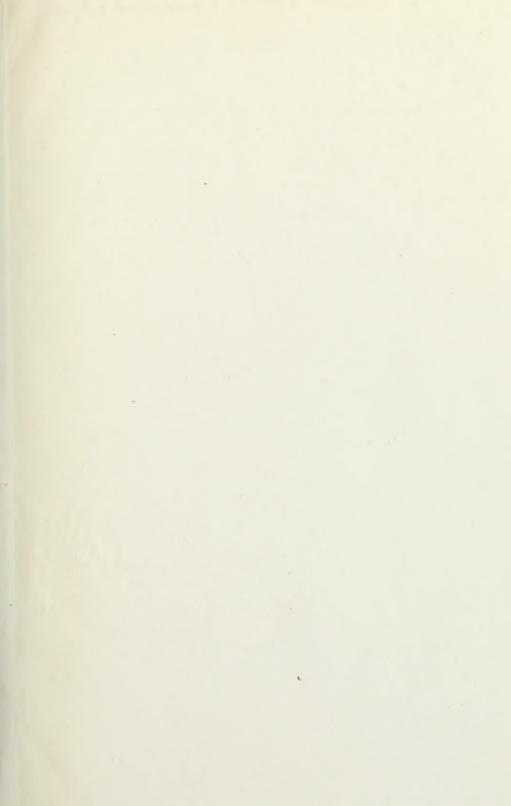
No. 77034

Presented by

EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.





1304

IN THE

United States 1304

Circuit Court of Appeals

For the Ninth Circuit

J. L. NIDAY and MOLLIE GREEN NIDAY, GEORGE A. BUELL and EFFIE ADA BUELL and A. L. GREEN,

Appellants,

VS.

JULIA GREEN GRAEF,

Appellee and Cross Appellant.

APPELLANT'S BRIEF

Upon Appeal from the United States District Court for the District of Idaho, Southern Division

ALFRED A. FRASER,
Solicitor for Appellants.

PLATT & PLATT,
MONTGOMERY & FALES,
Solicitor for Appellee.



No.....

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. L. NIDAY and MOLLIE GREEN NIDAY, GEORGE A. BUELL and EFFIE ADA BUELL and A. L. GREEN,

Appellants,

VS.

JULIA GREEN GRAEF,

Appellee and Cross Appellant.

APPELLANT'S BRIEF

Upon Appeal from the United States District Court for the District of Idaho, Southern Division

ALFRED A. FRASER,
Solicitor for Appellants.

PLATT & PLATT,
MONTGOMERY & FALES,
Solicitor for Appellee.

Digitized by the Internet Archive in 2010 with funding from Public.Resource.Org and Law.Gov

United States

Circuit Court of Appeals

For the Ninth Circuit

J. L. NIDAY and MOLLIE GREEN NIDAY, GEORGE A. BUELL and EFFIE ADA BUELL and A. L. GREEN,

Appellants,

VS.

JULIA GREEN GRAEF,

Appellee and Cross Appellant.

APPELLANT'S BRIEF

Upon Appeal from the United States District Court for the District of Idaho, Southern Division

STATEMENT OF THE CASE

This was an action commenced by the plaintiff in her own right and as assignee of Gratia Green Acuff and Filo F. Green against the defendants J. L. Niday and Mollie Green Niday, et al.

It is alleged in the bill of complaint that said Julia Green Greaf, Gratia Green Acuff, Mollie Green Niday, Filo F. Green, George L. Green and J. M. Green are the children and sole heirs at law of one R. E. Green, deceased.

It is further alleged that on and prior to the 22nd day of December, 1914, and the first day of October, 1915, the said R. E. Green was the owner and in possession of said real property described in the bill of complaint; that a part of said real property was subject to a lien of two mortgages; one in the sum of \$10,000.00 and the other in the sum of \$1,683.85; that the defendant, J. L. Niday, was during all the times mentioned in the bill of complaint the son-in-law of said R. E. Green and acting as attorney and confidential advisor of said R. E. Green; that such confidential relation continued to the time of the death of said R. E. Green; that said R. E. Green died intestate.

The bill further charges that the defendants J. L. Niday and Mollie Green Niday, the son-in-law and daughter of said R. E. Green, entered into a conspiracy and caused the said R. E. Green to execute and deliver to said J. L. Niday a warranty deed to the property described in the bill of complaint, which said deed was procured by the undue influence of said J. L. Niday and Mollie Green Niday and without any or sufficient consideration therefor; that the reasonable value of the property was the sum of \$30,000.00, subject to mortgage liens aggregating \$11,683.85.

The bill of complaint further alleges that the defendant, J. L. Niday and Mollie Green Niday, conveyed the property described in the complaint to the defendants George A. Buell, Effie Ada Buell and A. L. Green,

for the sum of \$30,000.00, and that the defendants Buell and Green received said conveyance with full knowledge of the claim of the plaintiff. The bill of complaint prays that these deeds be declared null and void: that the Court direct the said J. L. Niday and Mollie Green Niday, his wife, to execute and deliver to the complainant a deed of conveyance of said property and for an accounting of the rents, issues and profits. The answer of the defendants, J. L. Niday and Mollie Green Niday, consist of a denial of all of the material allegations of the complaint, except that they admit the execution and delivery of the deeds to the property by R. E. Green to said J. L. Niday and also admit that the said J. L. Niday and Mollie Green Niday have sold the premises to the defendants Buell and Green. The answer of the defendants, George A. Buell and Effie Ada Buell and A. L. Green, is to the effect that during the year 1918 said defendants purchased from J. L. Niday and Mollie Green Niday the property described in the bill of complaint, that they are innocent purchasers thereof and had no knowledge or information of any claim or demand of the plaintiff against the property.

Upon the trial of the cause it appeared that J. L. Niday, the defendant, had paid off the mortgages on said real property and had also paid up the taxes and other expenses in connection therewith. It also appeared that the complainant, Julia Green Graef in her own right as one of the heirs of R. E. Green, deceased, and as assignee of the interest of Gratia Green Acuff and Filo F. Green, two of the other heirs, was entitled

to a one-half interest in the property described in the bill of complaint if the deeds to said property to said J. L. Niday should be set aside and declared invalid. The other one-half interest in said property would go to the said defendants, Mollie G. Niday and J. L. Niday, as assignees of the two other heirs of the said R. E. Green deceased. It is admitted that the defendants, J. L. Niday and Mollie Green Niday, had sold the premises to the other defendants mentioned, George A. Buell, Effie Ada Buell and A. L. Green, for the sum of \$30,000.00, part of which had been paid in cash and the balance of the purchase price being evidenced by the promissory note of the said defendants in the sum of \$23,000.00, secured by a first mortgage on the premises described in the bill of complaint.

It was stipulated upon the trial of said cause that if the Court should find the issues in favor of the plaintiff that this note and mortgage received by the defendant, J. L. Niday, upon the sale of the premises should for the purposes of the decree be held in lieu of the lands. The Court, after hearing the evidence. entered an interlocutory decree in favor of the complainant against the defendants, J. L. Niday and Mollie Green Niday, adjudging that she was entitled to a onehalf interest in the note and mortgage received by said J. L. Niday upon the purchase price of said property; also adjudging that there was due to the said J. L. Niday for moneys paid out by him in satisfaction of the mortgage against the premises and other expenses incurred by him a balance still unpaid of \$8,626.93 and that one-half thereof, namely, \$4,313.47, was chargeable against the one-half interest to which the complainant was entitled. The Court further adjudged and decreed that upon the payment or tender by the complainant to said J. L. Niday of the sum of \$4,313.47, with interest thereon, on or before the first day of March, 1921, a final decree would be entered confirming in her a one-half interest in and to said note and mortgage of \$23,000.00. The complainant having tendered the said amount within the time mentioned, the Court entered a final decree in her favor, adjudging her to be entitled to a one-half interest in and to the note and mortgage aforesaid, and the defendants have appealed to this Court from said decree.

ASSIGNMENT OF ERRORS

I

Because the Court erred in not dismissing said action on account of the staleness of the claim and for the further reason that the plaintiff was guilty of such laches as not to be entitled to any relief in a Court of Equity.

H

Because the Court erred in not dismissing so much of the plaintiff's claim as is based upon the assignment to her of the interests of Filo F. Green and Gratia K. Acuff, of the subject matter of this suit on account of the staleness of such claim and laches of said Filo F. Green and Gratia Green Acuff; and the Court erred in granting any relief to said plaintiff of these assigned claims.

III

Because the Court erred in not dismissing the plaintiff's bill of complaint for the reason that there is no allegation in said bill of complaint offering on the part of the plaintiff to do equity or to place the defendants in status quo; and for the further reason that there was no offer made by the plaintiff upon the trial of said action offering to do equity or to place the defendants in status quo.

IV

Because the Court erred in not dismissing the plaintiff's bill of complaint for the reason that said bill of complaint does not set forth any reason for her delay in bringing this action.

V

Because the Court erred in not dismissing the suit, for the reason that the evidence shows that the plaintiff procured the assignments to her of the interests in the subject matter of the suit of Filo F. Green and Gratia G. Acuff, for the sole purpose of confirming jurisdiction of the Trial Court.

VI

Because the Court erred in overruling defendants' objection to the introduction in evidence of the complainant's Exhibit No. 8, which was introduced for the purpose of impeaching the witness John M. Green, called on behalf of the complainant.

VII

Because the Court erred in holding that the deed to the lands described in the complainant's complaint, known as Greenhurst Ranch, was given to the defendant, J. L. Niday, without adequate or sufficient consideration.

VIII

Because the Court erred upon the accounting between the parties in denying to the defendant, J. L. Niday, a credit in the sum of Four Thousand (\$4,000.00) Dollars, earned by him in professional services rendered said R. E. Green prior to the execution of said deed.

IX

Because the Court erred in holding in the interlocutory decree that the deed dated the 22nd day of December, 1914, and the deed dated the 1st day of October, 1915, are or were voidable at the instance of the grantor, R. E. Green or his heirs.

X

Because the Court erred in adjudging and decreeing to the complainant, Julia Green Graef, in her own right and as assignee of the interestst of Filo F. Green and Gratia K. Acuff, to be entitled to a one-half interest in and to, or the proceeds of the sale of the lands described in plaintiff's complaint.

XI

Because the Court erred in holding that the complainant is entitled to a one-half interest in and to that certain mortgage bearing date of the 14th day of December, 1918, and recorded at page 279 of Book 70, of the mortgage records of Canyon County, Idaho, said mortgage covering the property described in complainant's complaint and also in decreeing said complainant

to be entitled to a one-half interest in the note secured by said mortgage, which said note represents the balance of the purchase price of said Greenhurst Ranch.

XII

Because the Court erred in decreeing and requiring the defendant, J. L. Niday, to deposit in the Boise City National Bank an assignment in due form of a one-half interest in and to the note and mortgage above mentioned.

XIII

Because the Court erred in granting or decreeing to the complainant any relief whatsoever in this suit.

XIV

Because the Court erred in not requiring the plaintiff to pay to the defendant, J. L. Niday, the sum of \$8,626.93, being the unpaid balance due to the said J. L. Niday for moneys expended by him in paying off the mortgages upon the property mentioned in the bill of complaint, and for other expenses in connection therewith, the payment of which amount was necessary to place the said defendant Niday in statu quo and restore to him the moneys which he had paid out for the benefit of said real property.

ARGUMENT

In this suit the complainant seeks to set aside two (2) deeds to certain real property executed and delivered by R. E. Green, the father of the plaintiff, during his lifetime, upon the ground that said deeds were procured by fraud and undue influence upon the part of

the defendants, J. L. Niday and his wife, Mollie Green Niday. The first deed was dated the 22nd day of December, 1914, and conveyed to the defendant Niday the tract of land described in paragraph eight (8) of the plaintiff's complaint and containing six (6) acres, more or less. The second deed was made, executed and delivered by said R. E. Green to the defendant, J. L. Niday, on the 1st day of October, 1915, and conveyed to him the tract of land mentioned in paragraph eight (8) of the complaint and contained two hundred six (206) acres, more or less. On the 16th day of March, 1917, the said R. E. Green, the grantor mentioned in said deeds, died. The complaint in this suit was filed March 23, 1920. That on the 14th day of December, 1918, J. L. Niday and wife conveyed by warranty deed the lands mentioned in the bill of complaint to the defendents, A. L. Green and George A. Buell, for the consideration mentioned herein of Thirty Thousand (\$30,000.00) Dollars Seven Thousand (\$7,000.00) Dollars of the purchase price being paid in cash and the balance of Twenty-three Thousand (\$23,000.00) Dollars secured by a first mortgage upon the lands conveyed.

Ι

The Court erred in not dismissing said action on account of the staleness of plaintiff's claim and for the further reason that she was guilty of such laches as not to be entitled to any relief in a Court of Equity.

The deeds sought to be cancelled in this suit are dated December 22, 1914 and October 1, 1915, and the grantor therein lived until the 16th day of March, 1917. The deeds, if they were obtained by undue influence and

fraud, as alleged in the bill, they could have been set aside by the grantor at any time during his lifetime, after their execution and delivery to the defendant Niday. This being true, the statute of limitations would commence to run against any such action from the date of the respective deeds, and the statute having started to run during the lifetime of the grantor, his subsequent death would not interrupt the same.

In the case of Harris vs. McGovern, 99 U. S. 161, 25 L. ed. 317, the Supreme Court says:

"Nor is there any valid objection to the second conclusion of law adopted by the Circuit Court, which was that the cause of action having accrued and the statute of limitations having commenced to run during the lifetime of the devisor of the plaintiffs, the running of the statute was not interrupted by his subsequent decease and the descent of the right of action to the plaintiffs, though minors at the time and under disability to sue."

Also Meeks vs. Olpherto, 100 U. S. 564, 25 L. ed. 735.

In the case of Castro vs. Geil, 42 Pac. 804, the Supreme Court of California says:

"Respondents also contend that some of them are minors, and that they are not affected by the statute of limitations. But the cross complaint shows that these minors were not heirs of appellant's grantor when the deed was made, their parents, through whom they claim, being then, and for years afterwards, in life; and subsequent disa-

bilities do not stop the running of the statute. Alvarado vs. Nordholt, 95 Cal. 116, 20 Pac. 211; McLeran vs. Benton, 73 Cal. 329, 14 Pac. 879."

See cases cited 25 Y/C. 1269.

The Statute of Limitations of the State of Idaho governing suits of this character is as follows:

Section 6611, Idaho Compiled Statutes 1919, is as follows:

"Within three years.

"An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake."

And Section 6617 of said Codes provides:

"An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued."

In the State of Idaho the Statute of Limitations applies to suits of equity as well as to actions at law.

Ames vs. Howes, 13 Ida. 756.

Stout vs. Cunningham, 196 Pac. 208.

If this action was prosecuted in the State Court there is no question but what it would have been barred by the above statutes of limitation. The first having deed been made, executed and delivered in October, 1914, and the second deed in December, 1915, and the action having been commenced March 23, 1920, a period of more than four years having elapsed from the date of the accrual of the cause of action.

It is our contention that the section of the Idaho statutes providing a limitation of three years on actions founded on fraud should be applied to this case.

In the case of Chicago T. & M. C. Ty. Co. vs. Tillington, 19 S. W., the Court says, on page 474:

"The deed not being void it would seem to follow that the suit should not be considered as an action to recover land. Prima facie the deed conveys the title to the land and the title remains in the grantee, unless the deed is set aside for fraud or other adequate cause for avoiding the contract. We think that the primary purpose of the present suit is to cancel the deed upon the ground of fraud, and though a judgment of the land itself is asked, still, if this prayer should be granted, it would be rather as a result of the other relief, which must first be granted, than as a purpose for which the suit was brought. The land could not be recovered without first attacking directly and annulling the deed for fraud. That was the main purpose of the suit and fixes the character of the action. The action is personal and is entirely predicated upon the right to vacate the deed. We think that the general statute of limitations of four years should have been given in the charge by the Court."

In the case of Morgan vs. Morgan, 38 Pac. 1054, the Supreme Court of Washington says:

"The action must be classed as one for relief upon the ground of fraud. The deed in question was not void, but only voidable, at most. It passed to the defendant whatever title or interest

the plaintiff had in the lands, and she must have intended it to do so, although it is insisted that she did not know that she had any interest therein which she could enforce, and was induced to believe she had none, in consequence of the representations of the defendant to that effect. This will be more noticed later in the discussion of the remaining feature of the case. The action cannot be classed as one to recover real estate, within the ten-year limitation statute, although the result might be, in case of a favorable termination of it for the plaintiff, to restore to her a portion of the lands quit-claimed to the defendant. To do this. she must have the deed which she executed set aside, and for this purpose it is necessary to show that it was fraudulently obtained from her. The alleged fraud of the defendant is the basis of the plaintiff's action. The statute allows ample time within which to bring such a suit. It requires it to be brought generally within a time when the circumstances are likely to be fresh in the minds of the parties, and are susceptible of proof—before the evidence which might consititute a defense is likely to be lost or destroyed. It is true, the time is uncertain, in consequence of the statute requiring the action to be brought within three years from the time the fraud becomes known to the plaintiff; but there must be diligence in discovering the fraud, also."

also St. Paul S. J. Ry us Sage 49 Fiel 315

In the case of Swift vs. Smith, 79 Fed. 709, the Circuit Court of Appeals for the Eighth Circuit says:

"Counsel for the appellant contend, however, that the execution and delivery of the administrator's deed to Brown was in law a fraud upon the appellant, because it was a breach of duty by a trustee: and from this they argue that this suit is governed by Section 2911, and is not barred, because the appellant did not discover this fraud until within three years before the commencement of the suit. But if the execution of the administrator's deed and the repudiation of the trust thereby were 'facts constituting a fraud,' within the meaning of this section, the appellant was, as we have shown, chargeable with knowledge of these facts in 1871, 22 years before she commenced this suit. and her cause of action was therefore barred by this section. The provisions of this statute bar a suit, not only after three years from actual knowledge of facts constituting the fraud, but also after three years from knowledge of facts which would put a person of ordinary prudence upon an inquiry, which, if pursued with reasonable diligence, would lead to a discovery of the facts constituting the fraud."

In the case of Ware vs. Galveston City, 146 U.S. 102, 13 Supt. Ct. Rep. 33, on page 38, the Court says:

"Nor is there anything which takes any of the plaintiffs out of the operations of the statutes of limitations of Texas, so as to affect the question of laches. David White's widow was a femme sole from 1841 to 1853. The plaintiff Lumpkin became of age in 1843, the plaintiff Daniel O. White in 1847, the plaintiff Clement B. White in 1850, the plaintiff Cowles in 1852, and the plaintiff Mary A. Holtzclaw in 1854. Robert J. Ware died in 1867, and his widow, since that time, has been a femme sole. The longest period of limitation for any cause of action in Texas is 10 years."

In the case of Putman vs. N. A. & S. C. J. R. R. Co., 83 U. S. 21, L. ed. 361, the Court says:

"The Court must set aside that arrangement or they cannot recover. And the burden is upon them to establish the fraud. Had their bill been framed to set aside the arrangement because of fraud, it must have been held to have been filed too late. The statute of limitations bars actions for fraud in Indiana after six years, and equity acts or refuses to act in analogy to the statute. Can a party evade the statute or escape in equity from the rule that the analogy of the statute will be followed by changing the form of his bill? We think not. We think a Court of Equity will not be moved to set aside a fraudulent transaction at the suit of one who has been quiescent during a period longer than that fixed by the statute of limitations, after he had knowledge of the fraud, or after he was put upon inquiry with the means of knowledge accessible to him."

In the case of Teall vs. Schroder, 158 U. S. 172, 39 L. ed. 938, the Supreme Court in the opinion says:

"The law of the state creating the limitations,

to which particular reference was made, is found in Section 19 of the Act defining the time for commencement of civil actions, passed April 22, 1850; and in subdivision 4 of Section 338 of the Code of Civil Procedure of California; and further, it was contended that the alleged causes of complaint had become stale because of the lapse of time, according to the general principles of equity, and that the complainants had been guilty of laches in failing to attempt the enforcement of the same at the proper time, and it was insisted that so long a time had passed since the matters took place that it would be contrary to equity and good conscience for the Court to take cognizance thereof, and to require any answer to them. Section 19 of the Act of April 22, 1850, reads as follows: 'An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued.' This section applies specifically to actions for equitable relief. Other Sections of the Act provided for the limitation of actions at law. Subdivision four of Section 338 of the Code of Civil Procedure is as follows: 'An action for relief on the ground of fraud or mistake must be brought within four years after the cause of action accrues; the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake."

In the case of Moore vs. Nickey, et al, 133 Fed. 289, this Court in the opinion by Mr. Justice Gilbery says:

"In Curtner vs. United States, 149 U.S. 676, 13 Sup. Ct. 985, 37 L. ed. 890, the Court, referring to the statute of limitations of the State of California, by which no action could be brought for the recovery of real property or the possession thereof except within five years after the cause of action accrued, held that, whether the statute be applied directly or by analogy, or the rule in equity founded upon lapse of time and staleness of claim, the delay and laches were fatal to the maintenance of the suit. On the ground of laches the bill was, we think, properly dismissed. In the Federal courts it is not necessary, in order to let in the defense that the claim is stale, that a foundation should be laid by any averment in the answer. Sullivan vs. Portland, etc. R. R. Co., 94 U. S. 806, 24 L. ed. 324."

The deeds sought to be set aside in this action were duly recorded in the records of Canyon County, State of Idaho, the first being recorded on the 19th day of February, 1916, and the second deed being recorded on the 27th day of May, 1916. The plaintiff in this action is charged with notice of the fact of the transfer of this land to the defendant Niday from the date of such record.

In the case of Swift vs. Smith, supra, the Court says:

"The least investigation in the natural and usual
place to make such an inquiry would have led unerringly to a discovery, in 1871, of all the facts

which the husband of the appellant learned of his own accord, and brought to her attention in 1891, without any inquiry on her part. She was not the victim of any actual fraud or of any concealment. All the facts on which she now relies for relief were spread upon the records of the Probate Court of Pueblo county, and upon the records of the register of deeds at Denver, in 1871, open and ready for her inspection. The natural place to inquire after property of the estate of Russell, when she knew that he had lived and died in Pueblo county, in the State of Colorado, was in the Probate Court of that county An inquiry there would have disclosed a sufficient description of these lots and their location, both in the inventory of her father's estate and in the account of the administrator, to have led to a discovery of their occupation by Brown, and of the record of the deeds of them in the register's office at Denver. Under the principle of law to which we have referred, the appellant must be charged with the knowledge, in 1871, of all the facts on which this suit is founded, because she then knew facts sufficient to put a person of ordinary prudence and sagacity upon an inquiry which would have led inevitably to a knowledge of those facts, if it had been pursued with reasonable diligence. Moreover, if the records of deeds to and from the administrator were constructive notice to all who purchased the title under them that Nye originally held this title in trust for the appellant. it is difficult to perceive why those records and the records of the deeds which followed them were not constructive notice to the appellant of all the facts which they disclosed."

In the case of Tilton vs. Ladd, 164 N. W. 871, the Court says:

"Where a deed is filed prior to grantor's death all will be held to have been informed of its execution, starting limitation to run against them."

In the case of Clark vs. Van Loon, 79 N. W. 88, the Court says:

"The plaintiff is a non-resident of the state and did not have actual notice of the fraud of defendant until April, 1892. But those facts did not prevent the running of the statute. Bishop vs. Knowles, supra. The record of the deed was notice to the world of its contents."

In addition to the knowledge which the plaintiff might have obtained by an examination of the records of deeds of Canyon County as to the transfer of this land from her father to Mr. Niday, she admits that she obtained actual knowledge of this transfer in the spring of 1918 (Tr., page 259).

But the record shows that the complainant did know that the defendant Niday owned the 212-acre tract of land mentioned in the bill of complaint on March 27, 1917. This tract of land was known by the name of Greenhurst, and in a letter written by this complainant she refers to the defendant Niday's ownership of said ranch (Tr., page 63).

The complainant in this action claims an interest in the property as assignee of all the right and title of her sister, Gratia K. Acuff, and Philo Green, her brother, and the record disclosed the fact that these two assignors knew that the defendant Niday claimed to own this property immediately after the death of the said R. E. Green. Gratia K. Acuff testified as follows:

"I knew nothing of these things until my father's death. I first knew of the execution immediately following my father's death. My brother Jim told me."

Tr., page 71.

Philo Green, the other assignor, also knew of this transaction the day after the funeral of R. E. Green.

The defendant Niday testified as follows:

"I had a talk with Mr. Philo Green in regard to the execution of this deed made by his father and delivered to me. This conversation was, I think, the next day after Mr. Green's funeral. Gratia Acuff asked me if we could have a meeting in my office and talk over the affairs of Mr. Green."

(Tr., page 145.)

This testimony was not contradicted by either Gratia Acuff or Philo Green, although both were present at the trial of this suit.

Conceding, for the sake of argument only, that the statute of limitations did not run against these heirs until after they had knowledge of the conveyance to until after the death of R. E. Green and they had

knowledge of the conveyance to the defendant Niday. As to the interest of Gratia K. Acuff and Philo Green, the statute became a bar, as they admitted they knew of this transaction immediately after the death of the said R. E. Green, and the complainant, Julia Green Graef, in her letter above referred to of March 27, 1917, having had knowledge at that time of this transaction, her cause of action, if any, would have been barred within five days, as said R. E. Green died March 16, 1917, and the bill of complaint in this action was not filed until March 23, 1920.

II

Because the Court erred in not dismissing the plaintiff's bill of complaint for the reason that said bill of complaint does not set forth any reason for her delay in bringing this action.

We desire to particularly call the Court's attention to the fact that the bill of complaint is entirely silent as to why the action was not sooner commenced. She does not set out in the bill any reason whatever for her failure to diligently prosecute the suit and we contend that in an action of this character it is absolutely essential to set forth in the bill of complaint by direct averments what obstacles, if any, there were and what reason, if any, existed for her failure to prosecute the suit at an earlier date.

In the case of Reed vs. Brun, 157 Fed. 190, the Circuit Court of Appals for the Eighth Circuit says:

"The national Courts, sitting in equity, are not bound by the statutes of limitations of the states,

but they apply the doctrine of laches in analogy to them. If a suit discloses no extraordinary facts or circumstances, they apply the bar of laches at the expiration of the time prescribed by the statute of the state for the limitation of an action at law of like character, but if unusual conditions or extraordinary circumstances make it inequitable to allow the prosecution of a suit after a briefer, or to forbid its maintenance after a longer, period than that fixed by the statute, the chancellor will not be bound by the statute, but will determine the extraordinary case in accordance with the equities which condition it. Kellev vs. Boettcher. 29 C. C. A. 14, 21, 85 Fed. 55, 62. If the complaint invokes the exercise of the judicial discretion of the Court to permit the maintenance of his suit after the analogous statutory time has expired the burden is upon him to show that he has been guilty of no laches. He must specifically plead and prove what the impediments were to the earlier prosecution of his claim, if he was ignorant of the facts alleged in the bill, how he came to be so long without knowledge of them, the means, if any, by which the defendant concealed them, how and when he first came to know them, and such other facts and circumstances as would appeal to the conscience of a chancellor. 'And especially must there be distinct averments of the time when the fraud, mistake, and concealment, or misrepresentation, was discovered, and how discovered, and what the discovery is, so that the Court may clearly see

whether, by the exercise of ordinary diligence, the discovery might have been before made. For, if by such diligence the discovery might have been before made, the bill has no foundation on which it can stand in equity, on account of the laches'."

In the case of Hays vs. Seattle, 251 U. S. 233, 64 L. Ed. 243, the Court says:

"The only answer made to this is that the defense of laches was not pleaded. But in the equity practice of the Courts of the United States laches is a defense that need not be set up by plea or answer. It rests upon the long-established doctrine of Courts of Equity that their extraordinary relief will not be accorded to one who delays the assertion of his claim for an unreasonable length of time, especially where the delay has led to a change of conditions that would render it unjust to disturb them at his instance. It is for the complainant in his bill to excuse the delay in seeking equitable relief, where there has been such; and if it be not excused, his laches may be taken advantage of either by demurrer or upon final hearing. Maxwell vs. Kennedy, 8 How. 210, 222, 12 L. Ed. 1051, 1055; Badger vs. Badger, 2 Wall. 87, 95, 17 L. Ed. 836, 838; Marsh vs. Whitmore, 21 Wall. 178, 185, 22 L. Ed. 482, 485; Sullivan vs. Portland & K. R. Co., 94 U. S. 806, 811, 24 L. Ed. 324, 326; Mercantile Nat. Bank vs. Carpenter, 101 U.S. 567, 25 L. Ed. 815; Landsdale vs. Smith, 106 U.S. 391, 27 L. Ed. 219, I Sup. Ct. Rep. 350; Hammond vs. Hopkins, 143 U. S. 224, 250, 36 L. Ed. 134,

145, 12 Sup. Ct. Rep. 418; Galliher vs. Caldwell, 145 U. S. 368, 371-373, 36 L. Ed. 738-740, 12 Sup. Ct. Rep. 873; Hardt vs. Heidwever, 152 U. S. 547, 559, 38 L. Ed. 548, 552, 14 Sup. Ct. Rep. 671; Abraham vs. Ordway, 158 U. S. 416, 420, 39 L. Ed. 1036, 1039, 15 Sup. Ct. Rep. 894; Willard vs. Wood, 164 U. S. 502, 524, 41 L. Ed. 531, 540, 17 Sup. Ct. Rep. 176; Penn. Mut. L. Ins. Co. vs. Austin, 168 U. S. 685, 696-698, 42 L. Ed. 626, 630, 631, 18 Sup. Ct. Rep. 223."

In the case of Hardt vs. Heidwever, 152 U. S. 547, 38 L. Ed. 548, in the opinion the Court says:

"General allegations that there has been fraud. or mistake, or concealment, or misrepresentations, are too loose for purposes of this sort. The charges must be reasonable, definite, and certain as to time, and occasion, and subject matter. And especially must there be distinct averments of the time when the fraud, mistake, concealment, or misrepresentation was discovered, and how discovered, and what the discovery is, so that the Court may clearly see whether, by the exercise of ordinary diligence, the discovery might not have been before made. For, if by such diligence the discovery might have been before made, the bill has no foundation on which it can stand in equity, on account of the laches But the bill does not state what particular discoveries have been obtained, or when they were obtained, or by what inquiries, or in what manner, or at what time."

"On appeal this decision was affirmed, 48 U. S. 7 How. 819 (12: 928), and in delivering the opinion of this Court, Mr. Justice Grier laid down the rule in this language:

"'And especially must there be distinct averments as to the time when the fraud, mistake, concealment or misrepresentation was discovered, and what the discovery is, so that the Court may clearly see whether, by the exercise of ordinary diligence, the discovery might not have been before made'."

Similar declarations may be found in several subsequent cases: Badger vs. Badger, 69 U. S. 2 Wall. 87 (17:836) in which is found this quotation:

"The party who makes such appeal should set forth in his bill specifically what were the impediments to an earlier prosecution of his caim; how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance; and how and when he first came to a knowledge of the matters alleged in his bill."

Godden vs. Kimmell, 99 U. S. 201, 211 (25: 431, 434); Wood vs. Carpenter, 101 U. S. 135, 140 (25: 807, 808), in which this Court said:

"A general allegation of ignorance at one time and of knowledge at another is of no effect. If the plaintiff made any particular discovery, it should be stated when it was made, what it was, how it was made, and why it was not made * * * sooner." See also Lansdale vs. Smith, 106 U. S. 391, 394 (27: 219); Hammond vs. Hopkins, 143 U. S. 224, 251 (36:134, 145); Felix vs. Patrick, 145 U. S. 317, 332 (36:719, 722); Foster vs. Mansfield, C. & L. M. R. Co. 146 U. S. 88 (36:899); Fisher vs. Boody, I Curt. 206; Carr vs. Hilton, I Curt. 390; Moore vs. Greene, 2 Curt. 202.

"Tested by this rule, it is apparent that this bill must be held deficient in not showing how knowledge of the wrongs complained of was obtained by the plaintiffs. It is alleged that they were ignorant, and now have knowledge, and that they acquired such knowledge within a month prior to bringing the suit; but how they acquired it, and why they did not have the same means of ascertaining the facts before, is not disclosed."

In the case of Teall, et al. vs. Shaven, et al., 40 Fed. 774, the Court says:

"So, also, the means by which the complainants were so long kept ignorant of these rights by the respondents and the impediments, etc., to an earlier prosecution of their claims, are not sufficiently set out in the bill. Says the Supreme Court in Godden vs. Kimmell, 99 U. S. 211:

"'Courts of Equity, acting on their own inherent doctrine of discouraging for the peace of society antiquated demands, refuse to interfere in attempts to establish a stale trust, except where the trust is clearly established, or where the facts have been fraudulently and successfully concealed by the trustee from the knowledge of the *cestui que trust*.

Relief in such cases may be sought; but the rule is that the cestuie que trust should set forth in the bill specifically, what were the impediments to an earlier prosecution of the claim, and how he or she came to be so long ignorant of their alleged rights, and the means used by the respondent to keep him or her in ignorance, and how he or she first came to the knowledge of their rights. Badger vs. Badger. 2 Wall. 87; White vs. Parnther, 1 Knapp 227. When a party appeals to the conscience of the chancellor in support of a claim, says Mr. Justice Field, where there has been laches in prosecuting it, or long acquiescence in the assertion of adverse right, he should set forth in his bill specifically what were the impediments to an earlier prosecution of the claim; and if he does not, the chancellor may justly refuse to consider his case on his own showing, without inquiring whether there is a demurrer, or any formal plea of the statute of limitations contained in the answer. Marsh vs. Whitemor. 21 Wall 185."

None of these means are set out in this bill.

The same doctrine is repeated in Richards vs. Mackall, 124 U. S. 187, 8 Sup. Ct. Rep. 437. See also Sullivan vs. Railread Ce., 94 U. S. 806-811; Brown vs. County of Buena Vista, 95 U. S. 160; Hume vs. Beale's Ex'x, 17 Wall 336; Hayward vs. Bank, 96 U. S. 611; Speidel vs. Henrici, 120 U. S. 377-387, Sup. Ct. Rep. 610.

In the case of Stout vs. Cunningham, 196 Pac. 208, the Supreme Court of Idaho says:

"In cases of this character, where fraud, concealment, and ignorance of the facts are relied upon

to suspend the running of the statute of limitations, there must have been such concealment as would prevent a person exercising due diligence from discovering the facts. What diligence was used is a question of law to be determined by the Court from the complaint. Mere conclusions of law are not sufficient to remove the bar of the statute. The particulars of the discovery must be alleged. It should be stated when the discovery was made, what it was, how it was made and why it was not made sooner. The amended complaint is silent as to how the contract was obtained, neither are there any reasons assigned why the contract was not sooner obtained. In other words, the circumstances of the discovery are not fully stated. The fact that Cunningham gave out no information of his transactions with the Main ands would not be sufficient, or the fact that the plaintiffs knew nothing of the transaction between the Mainlands and Cunningham until they procured a copy of the contract between Cunningham and the Mainlands, would likewise be insufficient to bring them within the provisions of the statute. The general rule is announced in the case of Wood vs. Carpenter, 101 U. S. 135, 25 L. Ed. 807."

III

When it is sought to set aside transactions on the ground of the confidential relations existing between the parties or by reason of undue influence and not upon the grounds of actual fraud, the Courts are more strict

and require a greater degree of diligence in the commencement and prosecution of the suit.

In the case of Hoyt vs. Latham, 143 U. S. 553, 12 Sup. Ct. 568, the Court says:

"In cases of actual fraud, or of want of knowledge of the facts, the law is very tolerant of delay; but where the circumstances of the case negative this idea, and the transaction is sought to be impeached only by reason of the confidential relations between the parties, and the cestuis que trustent have ample notice of the facts, they ought not to wait and make their action in setting aside the sale dependent upon the question whether it is likely to prove a profitable speculation. As the question whether the sale should be vacated or not depends upon the facts as they existed at the time of the sale, so. in taking proceedings to avoid such sale, the plaintiff should act upon his information as to such facts. and not delay for the purpose of ascertaining whether he is likely to be benefitted by a raise in the property, since that would practically amount to throwing upon the purchaser any losses he might sustain by a fall, and denying him the benefit of a possible raise. Hammond vs. Hopkins, 12 Sup. Ct. Rep. 418."

The case last cited is peculiarly applicable to the facts in this case. The plaintiff after having knowledge of the facts, permitted the defendant to retain possession and ostensible ownership thereof, at least of the property, make improvements thereon, pay the taxes, and after he had made advantageous sale of the property she now seeks to reap the benefit thereof.

In Willard vs. Wood, 164 U. S. 502, 17 Sup. Ct. 176, the Court said:

"But the recognized doctrine of Courts of Equity to withhold relief from those who have delayed the assertion of their claims for an unreasonable length of time may be applied in the discretion of the Court, even though the laches are not pleaded or the bill demurred to. Sullivan vs. Railroad Co., 94 U. S. 391, 1 Sup. Ct. 350; Badger vs. Badger, 2 Wall. 87."

In the case of Ward vs. Sherman, 192 U. S. 168, 48 L. Ed. 391, the Court says:

"The property was turned over on a contract of sale. Ward was left in possession for over three years and a half without a suggestion of any claim that he was only a mortgagee in possession. He had a right to believe that he was the owner. If the contract had not been made he could have foreclosed his mortgage and acquired title by sale under foreclosure proceedings. He dealt with the property as his own. He gave his time, skill, and labor to the work of caring for it. It is impossible to replace the parties in the situation they were in at the time the contract was made. It would be grossly inequitable to deprive him of the benefit of his time, skill and labor, and give it to the mortgagor, who all those years did nothing and gave no notice of any question of the completeness of Ward's title. It seems to us that the doctrine of laches applies with force, and that upon the pleadings the Court should have adjudged the defendant not entitled either to rescission of the contract or to hold the vendee as a mortgagee in possession."

IV

The Court erred in not dismissing the plaintiff's bill of complaint for the reason that she did not offer to do equity or to place the defendant in *status quo*.

There is no allegation in the bill of complaint alleging the willingness or the ability of the plaintiff to return to the defendant the moneys paid out by him in paying off the liens on the premises or for taxes or improvements thereon.

The deed from R. E. Green to the defendant Niday recites that the premises are subject to mortgages in the sum of \$11,683.85, which the defendant Niday assumed and agreed to pay (Tr., page 149).

The defendant Niday did pay these mortgages and incurred other expenses in connection with this property. The plaintiff had knowledge of the fact that the defendant Niday had paid off these mortgages (Tr., page 150). Not only is the complaint silent upon this question of doing equity to the defendant as a condition precedent to the rescission of the deed, but the Court in its final decree did not do equity to the defendant or place the defendant in *status quo*.

The Court found that there was a balance due the defendant Niday by reason of his paying off these mortgages and other charges against the estate the sum of \$8,626.93 (Tr., page 53).

The Court further adjudged that the plaintiff should tender or pay to the defendant Niday the sum of \$4,313.47, just one-half of the amount which was due the said defendant.

In order to have placed the defendant in *status quo*, the Court should have decreed that the plaintiff pay to the defendant Niday the full sum of \$8,626.93, which said last mentioned amount should have been declared to be a lien against the securities or land, that upon a sale of the same any equity remaining should have been divided equitably between the parties.

This Court in a number of cases has announced the rule that a bill filed asking for the cancellation of a deed to real estate must show a tender back of the consideration received, or at least contain an unequivocal offer to restore the same, and an offer to credit the amount on any judgment recovered against the defendant is wholly insufficient.

In the case of Alaska & Chicago Commercial Co. vs. Solner, 123 Fed. 855, this Court says:

"Appellant contends that in a suit of this character a tender before suit is not necessary; that an offer in the bill to make the tender is all that is required. The authorities are not uniform upon this point, but conceding, for the purposes of this opinion, that appellant's contention, as a general propostition, is correct, yet it is apparent that the offer as made in the bill is wholly insufficient. The original bill of complaint filed September 15, 1901, did not contain any averment offering to return the purchase price of the property. The first

amended bill, filed September 2, 1902, did not make a sufficient offer."

This Court has announced the same rule in the following cases:

Hill vs. Northern Pacific Ry. Co., 113 Fed. 915. Mahr vs. Union Pacific Ry. Co., 170 Fed. 699.

In the case of Chicago Texas Land & Lumber Co. vs. Robertson et al., 169 Fed (C. C. A.) 287, the Court said:

"The bill in this case is one to cancel deeds of real estate sold to pay debts of complainant which were an admitted charge upon the lands conveyed, and is without equity, in that complainant does not even offer to restore the large sums of money paid out for its benefit in satisfaction of such admitted legal charges."

In the case of Stuart vs. Hayden et al., 72 Fed. 402, the Circuit Court of Appeals for the Eighth Circuit announces the rule in cases of this character as follows:

"If one who is induced to make a trade or sale by fraud would rescind it, he must immediately upon his discovery of the fraud, announce his intentions so to do, and return all the consideration he has received, to the end that the parties may be put in *status quo* before subsequent transactions have made such action impossible. Silence, delay, vacillation, acquiescence, or the retention and use of any of the fruits of the sale or trade that are capable of restoration, for any considerable length of time after discovery of the fraud, constitute a complete and irrevocable ratification of the transaction. Rugan vs. Sabin. 10 U. S. App. 519, 531. 3 C. C. A. 578, 580, 53 Fed. 415, 418; Kinne vs. Webb. 12 U. S. App. 137, 144, 4 C. C. A. 170. 174, 54 Fed. 34, 38; Scheftel vs. Hays, 19 U. S. App. 220, 226, 7 C. C. A. 308, 312, 58 Fed. 457, 460; McLean vs. Clapp, 141 U.S. 429, 12 Sup. Ct. 29; Grymes vs. Sanders, 93 U.S. 55, 62. The supposed cross bill utterly fails to state a case for rescission, because it does not show that Gruetter & Joers ever returned to Stuart the \$19,500.00 in cash which they received from this trade, or that they ever released Stuart from his agreement to pay the mortgage of \$30,000.00 upon the property they conveyed. They could not rescind this trade, and recover back that which they gave in exchange, or any part of it, while they retained at least \$49,500.00 in value that they had received from it."

In the case of Reeves vs. Corning, 51 Fed., on page 782, the Court says:

"There is another reason why this paragraph is insufficient. It does not allege that the plaintiff, prior to the bringing of the suit, returned or offered to return the patents to the defendant, and thus place him in *statu quo*, nor does it show any sufficient excuse for his failure to do so. It is well settled to justify citations, that, before an agreement can be rescinded, the plaintiff must have done all in his power, and with promptness, to place the

defendant in statu quo. For these reasons the paragraph must be held bad."

In the case of Brefogle vs. Walsh (7 C. C. A.) 80 Fed., on page 177, the Court of Appeals says:

"To be entitled to a cancellation or rescission of the agreements it was therefore necessary that the appellants, before bringing the suit, should themselves have offered to cancel the agreements, should have returned or offered to return to the trust company the Breyfogle notes which had been surrendered, and have repaid or offered to repay to that company, with interest, whatever sums it had paid to Voris or otherwise had expended. They could not treat such sums as an addition to their debt to the trust company, and so retain a benefit from the agreements which they sought to have rescinded."

In the case of Andrews vs. Hensler, 6 Wall. 254, the Supreme Court says:

"The rule that he who seeks to rescind a contract of sale must first offer to return the property received, and place the other party in the position he formerly occupied, so far as practicable, prevails equally at the civil and the common law. It is a rule founded in natural justice, and requires that the offer shall be made by the purchaser to his vendor upon the discovery of the defects for which the rescission is asked. The vendor may then receive back the property and be able, by proper care and attention, to preserve it, or he may have

recourse upon other parties, the remedies against whom might be lost by delay. He must be permitted to judge for himself what measures are necessary for his interest and protection and if the purchaser by delay deprives him of the opportunity of thus protecting himself, he cannot demand a rescission of the contract."

V

Courts of Equity will not decree the rescission of a deed where the complainant has not diligently prosecuted his claim and the property has greatly increased in value during the delay.

In this case every witness who testified upon the subject, including the witnesses for the complainant, stated that between the year 1915 and the year 1918 the lands in question had increased in value from 50 to 300 per cent.

George H. Moore, a witness on behalf of the complainant, testified:

"The decided increase in the value of the land has taken place within the last two or three years. There has been a decided increase in the value of farm lands in the last two or three years. An increase of 50 to 100 per cent. (Tr., page 79.)

Crawford Moore, president of the First National Bank of Idaho, testified:

"In my opinion, the increase in the value of lands such as the Greenhurst ranch between the year of 1915 and May, 1918, was from two to three times its value in 1914." (Tr., page 125.)

J. J. Walling, a witness for the defendant, testified:

"In my opinion, the value of such lands as Greenhurst and other irrigated lands in that vicinity doubled in value from the year 1915 to May, 1918. I know of a great many places that sold at double the value." (Tr., page 127.)

C. A. Glougie, a witness for the defendant, testified:

"The value of lands in that vicinity increased between 1915 and 1918 in value. The extent of the increase might be a little difficult question to answer. The good lands, the desirable pieces of property, have increased easily three-fold where others have not increased that much. I consider a part of Greenhurst desirable land." (Tr., p. 129.)

Scott Anderson, a witness called on behalf of the defendants, testified:

"I think lands have increased in value in that vicinity between 1915 and 1918. I would say the good productive lands have increased double."

(Tr., page 131.)

Under this state of facts, the complainant is not entitled to recover.

Patterson vs. Hewitt, 195 U.S. 309.

United States vs. Marshall Mining Co., 129 U. S. 579, 9 Sup. Ct. 343.

Johnson vs. Standard Mining Co., 148 U. S. 360, 13 Sup. Ct. Rep. 585.

In the case of Starkweather vs. Genner, 216 U. S. 524, 30 Sup. Ct. Rep. 382, the Court says:

"At most the sale was voidable, not void, and he who would complain must seasonably elect whether he will avoid it or not. Twin Lick Oil Co. vs. Murbury, supra. Appellant did not act with that degree of promptness which equity demands. He has slumbered over the question of whether he should elect to let Jumer hold on to his purchase or require him to give the benefit of his bargain to his co-tenants. A delay of not less than four years, during which there has been a large appreciation in the value of the property, is unreasonable."

It appeared upon the trial that the complainant and her brother and sister had at some time prior to the commencement of this suit filed an action in the State Court for the purpose of setting aside these deeds, which action they subsequently and before the commencement of this suit dismissed.

The Trial Judge in his opinion upon the question of laches says:

"It was therefore about two years after they learned of the deeds before they took action in the State Court and about three years before this suit was commenced." (Tr., page 47.)

Where the Court obtained its information as to the time of the filing of the action in the State Court we are unable to say, as the record is silent upon that question. For what reason that action was dismissed we do not know, possibly to avoid the bar of the statute of limitations in the State Court. However, that may be, it is immaterial when the suit was filed in the State Court, when it was dismissed, or for what reason. As far as this suit is concerned the filing of such an action did not operate to affect the running of the statute of limitations or relieve the complainant from the charge of laches.

In the case of U. S. vs. Fletcher, 231 Fed., on page 330 the Court says:

"The law is well settled that the mere institution of a suit does not relieve a person from the charge of laches and if he fail in its diligent prosecution the consequences are the same as if no action had been begun. Johnson vs. Standard Mining Co., 148 U. S. 360, 13 Sup. Ct. 585; United States vs. Des Moines Navigation Co., 142 U. S. 510, 12 Sup. Ct. 308; Patterson vs. Hewitt, 195 U. S. 309, 25 Sup. Ct. 35; Hagerman vs. Botes, 5 Colo. App. 391, 38 Pac. 1100; Willard vs. Wood, 164 U. S. 502, 17 Sup. Ct. 176. The doctrine operates not only as against the filing of a stale suit, but also against the slothful prosecution of a suit seasonably filed. Drees vs. Ealdron, 212 Fed. 93, 128 C. C. A. 609."

And in the case of Drees vs. Waldron, 212 Fed., page 97, the Circuit Court of Appeals says:

"In holding contrary to the ruling below, that a motion to dismiss the petition should have been granted, this Court cites: Johnson vs. Standard Mining Company, 148 U. S. 360, 13 Sup. Ct. 176, to the following effect:

"'It has been frequently held that mere institution of suit does not of itself relieve a person from the charge of laches and that if he fail in the diligent prosecution of the action the consequences are the same as though no action had been begun'."

We think upon an examination of the record in this case it will appear that even if the relation of attorney and client did exist between R. E. Green and the defendant Niday at the time of the execution of said deeds that the transaction was fair and that no advantage was taken of the grantor. The lands were encumbered by mortgage in the sum of over eleven thousand dollars, which amount the defendant assumed and agreed to pay, and which he did pay, thereby relieving the grantor from any liability therefor. There is some conflict in the evidence as to the value of the property at the time of the transaction, but the great preponderance of evidence is to the effect that it was worth not to exceed fourteen to fifteen thousand dollars. This evidence of the value is corroborated by the fact that it sold in 1918, at a time when such real property had reached its highest value, for \$30,000.00, and all the evidence is to the effect that it had increased from 100 to 200 per cent in value during this period of time. If this be true, then its value in 1915 did not exceed \$15,000.00. If any equity remained in this property in 1915 over and above the mortgaged indebtedness with interest and taxes, it is hardly sufficient to justify or sustain the charge of undue influence, fraud or oppression.

In addition to assuming the mortgage indebtedness on the property there was an additional consideration for this deed. For a long period of years the defendant Niday had acted as attorney and legal advisor of the said R. E. Green. He had presented no bill for his services, not had he demanded any pay therefor, nevertheless, Mr. Green, appreciating these services and being desirous of making some return therefor, he in a conversation had about that date with Mr. Niday, stated:

"Niday, you have been transacting the business of mine and my family here practically ever since you have been here and you have never been paid anything. I would like for you to have Greenhurst if you want it. I can't pay out on it, and it is of doubtful value, even for you." (Tr., p. 109.)

The defendant Niday testified that the reasonable value of these services would be at least the sum of \$4,000.00. The Trial Judge refused upon the accounting on this case to allow the defendant Niday any credit whatsoever for these services rendered. This we contend was error. Taking into consideration the value of these services of the defendant Niday we contend that at the date of these conveyances Mr. Green received the full value of the property conveyed.

Without taking up the time of the Court to review the evidence of the different witnesses upon the question of the mental capacity of R. E. Green to execute these conveyances, we do say that the plaintiff has not established such mental incapacity to an extent sufficient to justify the Court in setting aside these conveyances upon that ground, as the law requires that proof of such facts to be established be clear and satisfactory evidence. We particularly call the Court's attention to the case of Boardman vs. Lorentzen, 52 L. R. A. (N. S.) 476, a case in which the facts are very similar to the facts in this case. The Court in the above case announces the rule that in order to set aside conveyances on the ground of undue influence the burden is upon the plaintiff to establish that such influence was exercised, and the mental incapacity of the grantor, and the note to this case contains a very effective citation of authorities covering the questions involved in the case at bar. In the above case the Courts say:

"The findings were based on evidence more or less conflicting, supposed to indicate these circumstances; Mr. Svenson was somewhat feeble around about this time of the transaction in question and somewhat childish, impaired in memory and much reserved in manner as compared to his habits prior thereto, particularly up to the time of the death of his wife in 1903. He had several children, and, prior to the transfer, expressed an intention to treat them equally in disposing of his property. He gave all to defendant and his wife, placing the title in defendant's name."

In the above statement or findings of the Court we believe to cover the condition of Mr. Green, as testified to by the witnesses for the plaintiff.

Again in the opinion of the Court, on page 483, it is said:

"There is an absolute absence of any direct evi-

dence that appellant or his wife, by act or word, ever suggested to Mr. Svenson the idea of his conveying his property to them or either of them, or that they influenced him to reside with them, or that they ever interfered with his property or business affairs in any way whatsoever. On the contrary, as indicated in the statement, the direct evidence, and circumstantial as well, is to the effect that Mr. Svenson had his own way with his property up to the time of the transfer, did his own business without soliciting or taking or receiving advice from anyone, with perhaps the exception that defendant aided him somewhat at the time he sold the farm, all the transactions in respect to which are admitted to be beyond suspicion, and did not, by act or deed, show any dissatisfaction with the transfer to the defendant for the year afterwards, during which time, the evidence strongly tends to prove, he had sufficient mentality to appreciate the whole matter."

This also is the condition existing in the case at bar. There is no evidence whatsoever that Mr. Niday solicited a conveyance of this property from Mr. Green, or ever suggested to him the idea of making the conveyance to the defendant; so far as the record appears, it was the free, voluntary and unsolicited act of Mr. Green.

Further along in the same case the Wisconsin Court says:

"Such little circumstances, in such a situation, as waiting to be spoken to on neighbors calling, especially in case of difficulty of hearing, if characterized by a prompt and intelligent response, as is quite clearly established here was the case, notwithstanding some little evidence to the contrary, weigh very light. And so with the circumstances of being a little childish—as that term is commonly used by young or middle-aged persons, in speaking of old people who have gotten into the period and condition sometimes spoken of as second childhood: that is, where one, on account of age, has lost the assertiveness and self-helpfulness of former days so long as there is still full appreciation of surroundings and possessions, and the individuality requisite to the care of one's property and business. And so with evidence of such circumstances as occasionally forgetting names, or faces, or confusion as to just the way to return home on being absent therefrom, so long as there still remains, as in this case, up to the time of the transfer, capacity to conduct ordinary individual business, and such capacity is exercised. The fact that the deceased gave his property to the appellant, as representative of his daughter, to whom he evidently was more affectionately attached than any other of his children. instead of dividing it between all, has nothing unnatural about it, when viewed in the light of all circumstances bearing on the transaction. He had a right to do with his own what he had a mind to. His children had no rights in the matter at all, except to have him left free to act intelligently upon his own judgment and without coercion.

They were specially interested in that regard, but the right, in general, was no greater to them than to society at large. There is the high place, in contemplation of the fundmental principles of civil life, which the right of individual liberty to dispose of one's property by contract or will holds. It is not the business of Courts to undo what an old person may have done with his property, because of judicial notions of propriety or moral obligation in a case of this sort, or the wishes of relatives. however deserving. Did the man do freely what he wanted to do and was competent to decide upon? Those are the sole questions. They being answered in the affirmative, it ends the matter, whether the disposition be such as would seem to have been the best from a business or moral standpoint or not."

And again this Court says:

"Thus it is to be seen, in a case of this sort, upon a prima facie case being circumstantially made, calling upon the person charged with fraud to explain his conduct, there still stands the presumption against wrong-doing, eclipsed for the time being by the adversary presumption, but subject to be efficiently aroused by affirmative evidence, direct or circumstantial, so satisfactorily explaining the adversary circumstances that they no longer seem to exist by clear and satisfactory evidence. In the end, upon the whole case, the circumstances from which the alleged undue influence is inferrable, as matter of law must stand upon

such evidence. That is, the burden being upon the one charging undue influence, from first to last, to establish it by clear and satisfactory evidence, the rule goes to the existence of the circumstances; the effect of the circumstances is matter of law. Weaken the case as to any one of the vital major incidents so that it can no longer be said to exist by clear and satisfactory evidence, then the prima facie case once created is so far rebutted that the plaintiff cannot successfully stand thereon, but must go further."

Ball vs. Boston, 153 Wis. 27, 37, 141 N.W. 8, 12.

Under the facts and circumstances of this case we can find nothing unnatural or unreasonable in the transaction. It appears from the uncontradicted evidence that R. E. Green, just a short time before the deeds were given to the defendant Niday, he had nade convevance of all his other real property to the different creditors in satisfaction of the amount of the liens against the property. The testimony shows that the other lands conveyed were of as great a value if not greater per acre than Greenhurst. That the encumbrances against them and for which the conveyances were executed were not as great in proportion as that existing against the Greenhurst ranch. It seems to us from the evidence in this case that the only thing for Mr. Green to do was to deed this property to Mr. Niday. as he did, or turn it over to Mr. Dewey in satisfaction of the mortgage indebtedness. It also clearly appears from the evidence that the mortgage to Mr. Dewey upon Greenhurst ranch amounted to more than \$12,000

with the interest, and would become due and payable in about four month's time. In order to save this property for himself or his heirs, it was necessary for Mr. Green to do one of two things, either procure a person who would advance him upon the security of Greenhurst a sufficient amount of money to pay off the Dewey mortgage. This we claim was impossible, as the testimony of Mr. Crawford Moore was to the effect that persons loaning money upon real estate would not advance to exceed 50 per cent of the value thereof. Under this state of facts, the Court would have to find that in 1915 this ranch was worth the sum of \$25,000, and I do not believe that such value has been established by the evidence in the case.

The second method would be by a sale of the property by Mr. Green for a sum greater than the encumbrances against it. This method we also claim was not available for Mr. Green, as the testimony of Mr. Walling was to the effect that there were practically no sales of real estate in that vicinity at that period of time, except sale under foreclosure. So far as the situation appeared at that time, probably Mr. Green did the only thing he could do with his property in an effort to keep it within the family or allow the family to procure equity there might be in it; so far as the evidence shows, his son-in-law, Niday, was the only member connected with his family who had financial ability to save this property from forclosure and sale.

If the Court should find that at the time of the transaction complained of the relationship of attorney and client existed between Mr. Niday and Mr. Green,

vet we contend that there is nothing in the evidence which would justify the Court in setting aside the transaction. Transactions between attorney and client are not prohibited. All that is required is good faith upon the part of the attorney, and by that reason of his relationship to the client, or his possession of some knowledge or of some facts which would affect the value of the property, which was not possessed or known to the client and by reason thereof he obtained the property of his client for less than its value. In this case there is no evidence that Mr. Niday was better qualified to determine the value of Greenhurst than Mr. Green himself. There was no evidence that he took advantage of his situation as an attorney to procure the transfer of this property to him. There is no evidence that he induced, persuaded, or even solicited the conveyance of this property to himself. Further more we contend that the law does not prohibit all transactions between attorney and client. The rule only applies where the attorney seeks to purchase the subject matter of the litigation or the property which the client has consulted him about professionally. In this case there is no evidence that the relationship of attorney and client existed between Mr. Niday and Mr. Green involving in any way the property known as the Greenhurst ranch.

The rule on this question is stated in Thornton on Attorneys, Sec. 154, as follows:

"Transactions between attorney and client are not necessarily invalid, and where it appears that no advantage was taken of the client, that his consent to the transaction was not procured by concealment of the facts or any other improper means, that he was fully advised and knew the effect and consequence of his act, the transaction will be upheld."

And section 158 in Thornton on Attorneys is as follows:

"It is the policy of the law to especially scrutinize gifts, conveyances, and securities given by a client to his attorney pending the relation when connected with the subject matter of litigation and it will not permit the relation and confidence it implies to be turned to the profit of the attorney at the expense of the client, but an assignment or conveyance even of the subject matter of the litigation is not necessarily void."

Also in Section 153, Thornton on Attorneys, is as follows:

"The rule that an attorney who contracts with his client must show that no advantage was taken of the situation applies, of course, only where the relation of attorney and client exists. No presumption of fraud arises because one of the parties to a transaction is an attorney until it is shown that the other is his client. The fact that one of the parties to a contract is an attorney and that he offers to and does draw writing without charge does not impose upon such attorney the duties and obligations of the professional relationship or raise a presumption of fraud or justify a finding of undue influence against him. It must be shown that the

attorney had been consulted in regard to the particular transaction or that he was in a position to take an unfair advantage of the client."

The rule governing cases of this kind is stated in Kidd vs. Williams, 56 L. R. A. 879. In this case the Court says:

"The principle in all our cases is, that while the confidential relation lasts, and as to its subjectmatter, there must be no abuse of confidence with respect to it, by which the attorney secures an unjust advantage over the client. It is easy to see that in such time, and as to the business in which he is employed, the attorney could make unfair and unconscionable demands to which the client would yield, although he regarded them unjust, out of the fear of the consequences of a refusal or from the attorney's undue influence over him; but, when the business is over and the client, being sui juris, and fully informed as to the business transaction, and is on equal terms and dealing at arm's length with the attorney, voluntarily stipulates with him for compensation for his services which have been rendered, we are not aware of any principle on which such settlement can be properly set aside by the client, on the ground that he did not have competent and independent advice in making such settlement. Such a settlement could be set aside alone on the ground that there had been 'some intermixture of deceit, imposition, over-reaching, unconscionable advantage, or other mark of direct and positive fraud.' 1 Story, Eq. Jur. 307; 2 Pom. Eq. Jur. 960.

"The rule, even when the relation exists, is well expressed, sustained apparently by numerous cases. in 3 Am. & Eng. Enc. Law, 2d ed., p. 334, as follows: 'An attorney is under no actual incapacity. however, to deal with or purchase from his client. all that can be required is, that there shall be no abuse of the confidence reposed in him, no imposition or undue influence practiced, not any unconscionable advantage taken by him of his client. As has been stated, in a transaction of this character, the burden is upon the attorney to show its perfect fairness; but if the Court is satisfied that the party sustaining the relation of the client performed the act or entered into the transaction voluntarily, deliberately, and advisedly, knowing its nature and effect, and that no concealment or undue means were used to secure his consent to what was done, the transaction will be upheld.' If the client is competent and capable, and with full knowledge of the transaction he proposes to settle with his attorney, acts deliberately, and voluntarily settles his account for services with his attorney, there would seem to be no indispensable necessity for independent advice on the subject. This would certainly be true, when shown that there had been no fraud, deceit, or unconscionable advantage practised by the attorney on the client, which would rebut the presumption of a violation of confidence reposed, as much so as independent advice would

do. All that is necessary is for the client to be placed in such a position as would enable him to 'form an entirely free and unfettered judgment. independent altogether of any sort of control'. If this does not appear, it would be necessary to show that the client had independent advice, in order to remove the presumption of unfairness. But when this presumption is otherwise removed, a rule that would, in addition, require independent advice would seem to be arbitrary and unnecessary. 'It is only when confidence is abused that Courts of conscience interfere', and this essential fact is nuch cases may be shown by any competent evidence. Independent advice is simply a means of proof to establish the fairness of the settlement, and that it was voluntarily entered into free from undue influence. This is made clear under the decisions of this Court. Moses Bros. vs. Noble. 86 Ala. 408. 5 So. 181: Noble vs. Moses, 81 Ala. 530, 60 Am. Rep. 175, 1 So. 217."

For the reasons herein set forth we respectfully submit that the decree of the Court be reversed and the bill dismissed.

Respectfully submitted,

ALFRED A. FRASER,

Solicitor for Defendants.

No.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

J. L. NIDAY and MOLLIE GREEN NIDAY, GEORGE A. BUELL and EFFIE ADA BUELL, and A. L. GREEN, Appellants,

VS.

JULIA GREEN GRAEF,
Appellee and Cross Appellant.

BRIEF OF APPELLEE

PLATT & PLATT, MONTGOMERY & FALES, Solicitors for Appellee.



INDEX

	Page
Statement of Facts	1
Summary Trial Court Findings	9
Points and Authorities	15-21
Argument	21
Questions Involved	21
Mental Condition Mr. Green	27
Summary Appellee's Evidence	31
Summary Appellant's Evidence37-	39-49
Laches Not Applicable	57
Assignee May Sue	59
Brief on Cross Appeal	63
Assignment I of Cross Appellant	63
Assignment II of Cross Appellant	68
Assignment III of Cross Appellant	72
Assignment IV of Cross Appellant	73
Assignment V of Cross Appellant	74
Assignment VI of Cross Appellant	75
Assignment VII of Cross Appellant	77
Assignment VIII of Cross Appellant	79
Assignment IX of Cross Appellant	79
Review Appellant's Cases	81-88



United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

J. L. NIDAY and MOLLIE GREEN NIDAY, GEORGE A. BUELL and EFFIE ADA BUELL, and A. L. GREEN, Appellants,

VS.

JULIA GREEN GRAEF,
Appellee and Cross Appellant.

BRIEF OF APPELLEE

STATEMENTS OF FACTS.

This is a suit to set aside two deeds.

The deeds were procured from an old man over eighty years of age, at a time when his mind was no longer a safe guide for his actions.

These deeds were so procured by the appellant, J. L. Niday.

J. L. Niday was at that time, and still is, a lawyer, practicing in Boise, Idaho.

He was the attorney for the old gentleman from whom he procured these deeds.

He was the son-in-law of the old gentleman from whom he procured these deeds.

He was the confidential advisor of the old gentleman from whom he procured these deeds.

He was the life-long friend of the old gentleman from whom he procured these deeds.

The deeds in question covered two hundred twelve acres of land located in Canyon County, Idaho.

These lands comprised a ranch, which was commonly known as, "Greenhurst."

The ranch was named for a man by the name of R. E. Green, who was one of the old-time settlers of Nampa, Idaho.

This ranch was the residence of Mr. Green and his family, which was comprised of his wife and six children.

His wife was a woman of strong character and of great business capacity, and she was virtually the active manager of this ranch.

Mr and Mrs. Green had a very happy domestic relation, and he relied very strongly upon her judgment.

They made this ranch their home in the year 1900.

In 1909, Mrs. Green was very suddenly killed in an accident.

Her sudden death had a very serious effect upon Mr. Green.

From the time of her death down until the time of his own death, in March, 1917, Mr. Green underwent a steady and continuous mental and physical decline.

In the spring of 1914, the appellant, J. L. Niday, acting in conjunction with his wife, determined that it was necessary to move Mr. Green from Nampa, Idaho, to Boise, Idaho.

The primary reason for this change was the physical and mental condition of Mr. Green.

He was no longer able to properly take care of himself and run the affairs upon his ranch in Nampa, Idaho.

In fact, Mr. Niday telegraphed to a sister-in-law of Mr. Green's, residing in Ohio, to come west and take care of Mr. Green.

See Transcript, p. 88.

The name of this sister-in-law was Mrs. Carrie Wager.

She came to Nampa, Idaho, in the summer of 1914.

At that time, Mr. Green was moved to Boise, Idaho, and placed in a house belonging to Mr. Niday.

Mr. Green remained in this house, under the care of Mrs. Wager, until the time of his death, in March, 1917.

On the 22nd of December, 1914, Mr. Green executed and delivered to J. L. Niday a warranty deed covering a tract of six acres out of the two hundred twelve acres already referred to.

This deed was withheld from the public records from December 22, 1914, until February 19, 1916.

On October 1, 1915, about eleven months after the execution of this deed, Mr. Green executed and delivered to Mr. Niday a second deed, covering two hundred six acres, being the balance of the property included in the home place called "Greenhurst."

This deed was withheld from record from October 1, 1915, until May 27, 1916.

Upon the trial of this case, Mr. Niday gave the following reasons for withholding this deed from record.

He stated that at the time when he procured this deed from Mr. Green, he desired to obtain from the State Land Board of Idaho a loan of \$5,000.

He further stated that no one person could borrow more than \$5,000.

He further stated that he already had a loan in that amount.

He, therefore, asked Mr. Green to make an application to the State Land Board for a loan in this amount.

If, however, the deed from Mr. Green to himself had been placed of record, Mr. Green would not have been able to obtain this loan, because the record would have shown the title in Mr. Niday.

Therefore, in order to deceive the officials of the State of Idaho, he withheld this deed from record.

See Transcript, p. 119.

The deception was not successful.

The Land Board refused the loan.

Following the execution of these deeds, Mr. Green remained in the house owned by Mr. Niday until March, 1917, when he died.

From the time of the removal of Mr. Green from Nampa to Boise, Idaho, in 1914, until the time of his death, Mr. Niday acted in the capacity of his attorney, his advisor, and his apparent friend.

In addition to this, he was a son-in-law of Mr. Green.

During the year 1914, he compelled Mr. Green to sign a letter addressed to a friend by the name of George H. Moore, which letter was abusive in character.

See Transcript, pages 76-78.

Mr. Moore resided at Nampa, Idaho.

After the writing of the letter, Mr. Green went to Mr. Moore and apologized for it, saying that Mr. Niday had made him write it.

Mr. Green also stated to his sister-in-law, Mrs. Egbert, that he had just written the meanest letter he had ever written, and that Mr. Niday had compelled him to sign it.

See Transcript, p. 94.

A short time before Mr. Green's death, Mr. Niday endeavored to arouse him from a stupor, in order to procure his signature to a paper.

See Transcript bottom pp. 70, 89.

Julia Green Graef, the appellee in this case, is a daughter of R. E. Green, deceased.

Knowledge of the existence of the deeds from Mr. Green to Mr. Niday was withheld from Julia Green Graef until the spring of 1918, over a year after her father's death.

Knowledge of the execution of these deeds was withheld from another daughter of Mr. Green, Mrs. Acuff, until after her father's death.

Knowledge of the execution of these deeds was withheld from Philo F. Green, a son of Mr. Green, until after the death of his father.

Mrs. J. L. Niday, who was a daughter of R. E. Green and the wife of J. L. Niday, apparently knew of these deeds prior to her father's death.

The other two sons, Jack Green and Jim Green, apparently knew of these deeds prior to their father's death, and after their father's death conveyed their interest in the property to J. L. Niday.

One of these sons, Jack Green, appeared upon the trial of this case and attempted to commit perjury.

The other son, Jim Green, did not appear upon the trial.

When Julia Green Graef learned of these deeds, more than a year after her father's death, she entered into correspondence with J. L. Niday, and asked him for an explanation of the transactions.

As a result of this request, negotaiations were had for a possible settlement with herself and the other heirs, but Mr. Niday finally refused to carry out the terms of settlement.

In December, 1918, Mr. Niday sold the property covered by these deeds for a consideration of \$30,000.

Thereafter, a suit was instituted by Julia Green Graef; her sister, Mrs. Acuff; and her brother, Philo Green, to have these deeds set aside on the ground that

they were improperly obtained from their father, while acting under the influence of J. L. Niday.

This suit was instituted in the county where the property was located, and on motion was removed to the City of Boise, Idaho, where Mr. Niday resided and practiced law.

Subsequently to this removal, the brother and sister who had joined with Julia Green Graef, became dissatisfied with the delay of the litigation, finding themselves in need of money, and asked Julia Green Graef to purchase from them their interest in the litigation.

This she did, by borrowing from her husband.

This act made her the sole party plaintiff, because the other brothers had released their interest to Mr. Niday for a consideration.

Julia Green Graef was a resident of the State of Oregon, and therefore dismissed the case which was pending in the State Courts of Idaho, and brought the present action in the Federal Court for that district, on the ground of diversity of citizenship.

The case came on for trial on the 4th day of October, 1920, before his Honor, Judge Dietrich, and after a full and complete hearing the court rendered a decision in favor of the plaintiff, Julia Green Graef.

It is from this decision that the present appeal has been taken by J. L. Niday and Mollie Green Niday, his wife.

The parties to whom the property was conveyed by Mr. Niday, were made parties defendant in the case, and it was stipulated at the close of the trial that if a decree was rendered in favor of the plaintiff, the title which she thereby acquired could be confirmed in the purchasers, and the plaintiff would accept the position of mortgagee to the extent of the interest which she represented.

The decision rendered by the trial court contained a full and complete series of findings, and announced the rules of law applied to the facts as found.

This decision appears upon pages 37 to 49, inclusive, of the Transcript of Record, and may briefly be summarized as follows:

The court found from the evidence, the following facts:

That the defendant J. L. Niday was an attorney at law.

That Mr. R. E. Green was one of the old settlers of Nampa, Idaho, and a man trained in the profession of civil engineering, and likewise educated in literature and the fine arts.

That Mr. Green was a man having a capacity for administration and office details, though not possessing in a high degree the qualities requisite to independent enterprising.

That in 1909 his wife, who assumed the leadership in his business affairs, suddenly died as a result of an accident.

That, grief-stricken and under the necessity of taking the initiative without his wife, he became involved in debt.

That in 1914 he was induced by J. L. Niday and some of his children to move to Boise, Idaho.

That he was then 78 years of age.

That he was placed in a small home, rented for him, together with his mother-in-law and his sister-in-law.

That J. L. Niday and his wife also lived at Boise, in close proximity to Mr. Green, and the other children lived at distant points.

That for twenty years prior to 1914, J. L. Niday had been on very intimate terms with Mr. Green, by virtue of family ties, professional relations, and friendly associations.

That he looked to J. L. Niday, instead of his sons, for guidance.

That with the assistance of J. L. Niday, he negotiated terms of settlement by which they satisfied all outstanding unsecured claims, in consideration of deeds to mortgaged property.

That upon completing this settlement he deeded to J. L. Niday six acres of land, on December 22, 1914,

for the expressed consideration of one dollar, and said deed was withheld from record until February 19, 1916.

That on October 1, 1915, he executed another deed with a consideration of one dollar and other considerations, covering two hundred six acres, subject to a mortgage of ten thousand dollars and another in the sum of one thousand, six hundred eighty-three dollars, eighty-five cents.

That this deed was withheld from record until May 27, 1916.

That in the early part of 1916 Mr. Green had a severe attack of pneumonia, from which he never fully recovered.

That Mr. Green was in an extreme case of second childhood, brought on by old age and hastened by the shock of his wife's death and the consciousness of business defeat.

That in his settlement with strangers he was protected by the zealous and able assistance of J. L. Niday, but that in dealing with J. L. Niday, however, a member of his own family and a close personal friend, and in whom he had implicit confidence, he was unaided, and alone.

That "against such a one he would have neither the capacity to be wary nor the strength of will to make resistance."

Transcript, p. 41.

From these facts, the court then deduced the following conclusion, with reference to the plaintiff's case and the burden of proof.

"In view of his mental condition and the relation of confidence which had long existed between him and the defendant, no transfer by which the latter would secure any undue advantage could be permitted to stand, even though there might be no actual intent to defraud or overreach. In such a case the burden would be put upon the defendant to show the fairness of the transaction."

Transcript, bottom p. 41, top p. 42.

The court then continued to review the evidence offered by the defendant with reference to the transfers and found:

That the minimum value of the property at the time of the transfers was fifteen thousand dollars.

That such value left Mr. Green an equity of at least three thousand in excess of indebtedness.

That the defendant attempted to offset this three thousand dollars by a bill for professional services, which was unitemized and had never been submitted to Mr. Green.

That "it is clear, I think, that there was never any intention to make a charge."

Transcript, p. 43.

That without advising Mr. Green of the consequences of the suggested step or attempting to dissuade him therefrom, the defendant accepted the offer of sale and prepared the deed, which was executed and delivered.

That, "upon such delivery the grantor, a help-less old man, stood penniless."

Transcript, p. 43.

From these facts, the court concluded as follows:

"In view of all the circumstances, the transfer to the defendant was not merely improvident; unless attended by an understanding that the title was to be taken in trust, or that the defendant assumed some obligation of support, touching which there is no testimony, the act was scarcely rational."

Transcript, p. 43.

The court then found that even if the land was worth only fifteen thousand dollars, that nevertheless there was a substantial margin in favor of Mr. Green.

The court also was of the opinion that if a shrewd business man had loaned approximately twelve thousand dollars on the property, that the land must have been worth more than fifteen thousand dollars.

With these observations in mind, the court then concluded that:

"Under the undisputed facts and the explanation of the defendant, it is unthinkable that either he, as a disinterested party, or any other competent person, would have advised or approved of such a transfer. Added to the inherent unreasonablesness of the transactions, if we assume the deeds to have been absolute and without other consideration, is the circumstance that both instruments were, for a long time, withheld from record, and that in the case of each, after its execution and delivery, the grantor, acting under the direction of the defendant, represented to public officials that he was still the owner * * It is sufficient to say that no theory or explanation of the transaction has been suggested upon which the transfers can be sustained."

Transcript of Record, p. 44.

After announcing the above conclusions, the court then cited the universal rule that where a fiduciary relation exists, a purchase by the trustee casts upon such trustee or confidential advisor the absolute burden of showing the fairness of the transaction.

The court further held that the evidence of the defendant had failed to establish this burden.

The court also found from the facts, and concluded as a matter of law, that the defense of laches had not been established by the defendant.

This appeal directly attacks the sufficiency of the court's findings of fact, and challenges the court's legal conclusions.

There is also raised a question of jurisdiction in permitting the plaintiff to take an assignment of claims from her brother and sister, but this is incidental to the main relief, and we will discuss it at a further stage in this brief.

It is the contention of the appellee that the decree of the court should be affirmed, and as a basis for such affirmance she submits the following:

POINTS AND AUTHORITIES.

I.

"It is the established rule that the findings of the trial court in a suit in equity must be taken as presumptively correct, and that unless an obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence, the findings will not be disturbed by the appellate court. This rule is especially applicable in a case in which, as here, the testimony was taken in open court, where the trial court had the opportunity to observe the demeanor of the witnesses and their manner of testifying, and the appellate court has before it only a condensed printed statement of the evidence as it is presented under the new equity rule. Thorndyke v. Alaska Perseverance Mining Co., 164 Fed. 657, 90 C. C. A. 473; Brandt v. United States, 198 Fed.

449, 117 C. C. A. 208; Harper v. Taylor, 193 Fed.944, 113 C. C. A. 572."

Tobey v. Kilbourne, 222 Fed. 760, 763 (C. C. A. Ninth Circuit.)

II.

This is a suit to set aside deeds and declare a trust on the ground that they were obtained from a man whose mind was no longer a safe guide for his actions.

III.

"The legal principles involved are not intricate nor difficult of application. Where deeds are obtained by the exercise of undue influence over a man whose mind has ceased to be a safe guide to his actions, it is against conscience for him who has obtained them to derive any advantage therefrom."

Crabb vs. Watts, 249 Fed. 357, 365 (Or.).

Affirmed, Crabb vs. Watts, 257 Fed. 718 (C. C. A. Ninth Circuit).

IV.

"But it is not necessary, in order to secure the aid of equity, to prove that the grantor was at the time insane or in such a state of mental imbecility as to render him entirely incapable of executing a valid deed. It is sufficient to show that, from sickness and infirmity, he was at the time in a condition of mental weakness, and that there was gross in-

adequancy of consideration for the conveyance. From such circumstances, imposition or undue influence will be inferred."

Crabb vs. Watts, 249 Fed. 357, 365.

Affirmed, Crabb vs. Watts, 257 Fed. 718.

V.

"A fiduciary relation existing between the grantor and those concerned in securing a benefit under the terms of the grant raises a presumption against validity, and casts the burden of establishing good faith upon the person asserting the regularity of the transaction. * * * and the secrecy with which the transaction is accomplished often furnishes a badge of fraud."

Crabb vs. Watts, 249 Fed. 357, 365.

Affirmed, Crabb vs. Watts, 257 Fed. 718.

VI.

"Whenever a fiduciary relation exists, legal or actual, whereby trust and confidence are opposed on the one side and influence and control are exercised on the other, courts of equity, independent of the ingredients of positive fraud, through public policy as a protection against overweening confidence will interpose to prevent a man from stripping himself of his property."

Highberger vs. Stiffler, 21 Md. 352.

VII.

"The law looks with a jealous and inquiring eye on a deed made by an old and infirm person to a young relative or associate for inadequate consideration, where the grantee has opportunity to influence the mind of the grantor, especially where no reasonable provision has been made by the grantor for his own children or nearest blood relation."

Price vs. Meade, 207 S. W. 695, 697 (Ky. 1919).

VIII.

"The law is well settled that if an attorney purchases any property belonging to his client—not property which is at the time in litigation—the transaction is viewed with suspicion, and he assumes the heavy burden of proving that the transaction is characterized by the utmost fairness and good faith, and not tainted with fraud or undue influence, and that the client acted upon the fullest information and advice."

Sampliner vs. Motion Picture Patent Co., 255 Fed. 242, 246.

IX.

A grantor dealing with a confidential advisor, and to whom he has conveyed property, should receive the benefit of the independent advice of a disinterested, competent advisor.

Young vs. Love, 65 So. 337, 338.

Nesbit vs. Lockman, 34 N. Y. 167; 42 Mo. 483; 68 N. J. Eq. 664; 40 Ark. 28; 2 Q. B. 679; 141 Mass. 329; 186 Ill. 225; 86 Va. 793; 91 Pac. 348; 31 Barb. 9; 63 Md. 371; 22 N. C. 252.

X.

Laches is a question of fact, and such question of fact has been determined in this case by the trial court.

XI.

Laches is a question of fact in each particular case, and is never invoked to defeat justice, and never applied unless unusual conditions require its application.

Smith vs. Smith, 224 Fed. 1, 6 (C. C. A. Ninth Cir.).

XII.

Where the party interposing a defense of laches has contributed to or caused the delay, he cannot take advantage of it.

Northern Pac. vs. Boyd, 177 Fed. 804, 824.

XIII.

Where a conveyance is made in a confidential relation, the presumption is against the propriety of the transaction, and this presumption must be overcome by evidence other than the ordinary evidence of the execution of the deed such as the appearance before a notary.

Nesbit vs. Lockman, 34 N. Y. 167, 170.

XIV.

"If the fiduciary relation of guardian and ward, existed at the time of the execution of the gift or devise, and the parties were so situated with reference to each other, that undue influence could have been used, the law presumes that it was used, and those seeking to derive advantage from it must rebut the presumption by competent and convincing proof. This presumption rests upon three facts for its formation; first, the fiduciary relation; second, the gift or devise to, or in the interest of, the guardian; third, an opportunity for an exercise of undue influence."

Cornet vs. Cornet, 154 S. W. 121, 137, 138.

XV.

An assignee of a claim purchased bona fide and for a consideration may sue in his own name, and the motive of the assignment will not be inquired into.

Dickerman vs. Northern Trust Co., 176 U. S. 181.

Cross vs. Allen, 141 U. S. 528.

Lanier vs. Nash, 121 U. S. 404.

XVI.

A suit to enforce rights to a trust estate can be maintained in the Federal Court by an assignee of the interest.

Brown vs. Fletcher, 235 U. S. 589.

ARGUMENT.

The argument of this case, from the standpoint of the appellee, is confined within very narrow limits.

The case involves, primarily, pure questions of fact.

Those questions are as follows:

Did a confidential relation exist between the appellant, Niday, and R. E. Green, deceased?

Did Mr. Green, during the period of that confidential relation, make a conveyance of property to the appellant, Niday?

Did the appellant, Niday, pay Mr. Green dollar for dollar in value for the property received?

At the time of this conveyance was Mr. Green in a condition such that his mind was no longer a safe guide for his actions?

If a confidential relation existed; if a conveyance was made; if the consideration was not entirely adequate; and if Mr. Green's mind was no longer a safe

guide for his actions, then it follows, as a matter of law, that the conveyance is presumed to have been obtained by undue influence, and should, therefore, be set aside.

"If the fiduciary relation of guardian and ward, existed at the time of the execution of the gift or devise, and the parties were so situated with reference to each other, that undue influence could have been used, the law presumes that it was used, and those seeking to derive advantage from it must rebut the presumption by competent and convincing proof. This presumption rests upon three facts for its formation; first, the fiduciary relation; second, the gift or devise to, or in the interest of the guardian; third, an opportunity for an exercise of undue influence."

Cornet vs. Cornet, 154 S. W. 121, 137, 138.

Upon the trial of this case, all of these facts were found in favor of the appellee, and under the established rule announced by this court (222 Fed. 763) the findings of the trial court must be taken as presumptively correct, and unless an obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence, the findings will not be disturbed by this court.

It remains only to ascertain whether or not there is evidence to support the findings of the court, and then ascertain the correctness of the rules of law applied to those findings.

A detailed history of the facts shown by the record appears in our opening statement.

We will, therefore, endeavor to confine this argument to a very brief resume of the evidence establishing these facts.

It is admitted that Mr. Niday was a son-in-law of Mr. R. E. Green.

It is admitted that Mr. Niday was a lawyer, practicing at Boise, Idaho.

Upon the trial of this case, Mr. Niday denied in his amended answer that he was the attorney for Mr. Green at the time when these conveyances were taken, or that he was the attorney for Mr. Green subsequent to the conveyances.

See p. 30, par. IV, Transcript of Record.

While on the witness stand, however, Mr. Niday's attention was called to a contract that was prepared in November, 1914, by which Mr. Green conveyed his property to some mortgagees, and Mr. Niday admitted that he undoubtedly looked it over for Mr. Green.

See Transcript, p. 120.

Again, while on the witness stand, Mr. Niday's attention was called to an answer which he had filed in the State Court for Canyon County, Idaho, which answer recited, amongst other things, as follows:

"These defendants deny that said R. E. Green was greatly influenced by the opinion and judgment of the said J. L. Niday, except upon occasions when the said R. E. Green consulted said J. L. Niday as attorney at law and requested his opinion upon matters of law."

See Transcript, p. 122.

In addition to all of the above, Mr. Niday asserted, while on the witness stand, that he had been ocassionally consulted as an attorney by Mr. Green since 1896 and up to the year 1914 and '15.

See Transcript of Record, p. 134.

He also asserted that the reasonable value of such services was \$3,000.00 or \$4,000.00, and this happens to amount to the difference between the mortgage on the property in controversy and its minimum value as fixed at \$15,000.00.

Again, on p. 117 of the Transcript of Record, Mr. Niday testified as follows:

"He (i. e. Green) sought me a great deal, came to my office almost daily after he was sick, and if I was busy would wait in the office until he could see me."

From the above facts the court concluded that there existed between Mr. Niday and Mr. Green the relationship of attorney and client, and that of close friendship.

It thus appears that the court's findings in this particular are amply supported by the appellant's evidence. The very fact that Mr. Niday would go upon the stand and testify that he had been the attorney for Mr. Green from 1896 down until 1914 and '15, and then deny in his answer that he was the attorney for Mr. Green in 1914 and '15, when these conveyances were made, very perfectly establishes the kind of influence to which Mr. Green must have been subjected during his declining years.

This is doubly true when we take into consideration the further fact that in the year 1916 the same Mr. Niday endeavored to get Mr. Green to represent to public officials that he was still the owner of the land after he had conveyed it to Mr. Niday.

It should also be remembered in this connection that this is the same Mr. Niday who withheld the deeds from public record for a considerable period after their execution and delivery, and then concealed from the appellee in this case—one of the daughters of Mr. Green—any knowledge concerning the existence of the deeds until more than a year after the death of her father.

It is admitted that the transfers in question were made from Mr. Green to Mr. Niday.

It is admitted that these transfers stripped Mr. Green of his last vestige of property.

The lowest estimate placed upon the two hundred twelve acres of land by the witnesses for the appellant, himself, was between \$15,000.00 and \$16,000.00.

See Transcript, p. 127.

The mortgages upon the property plus some accumulated interest totaled \$12,187.44.

See Transcript, p. 111.

This left a margin of approximately \$3,000.00 in favor of Mr. Green, taking the property at its lowest valuation.

It, therefore, appears that Mr. Niday did not pay Mr. Green dollar for dollar for the property which he received, and that the consideration was grossly inadequate, when it is remembered that this was the last dollar which Mr. Green possessed.

In order to supply this deficiency, Mr. Niday introduced evidence to show that he had performed legal services for Mr. Green of a value aggregating \$3,000.00 or \$4,000.00.

This statement was unitemized, and there was no evidence introduced to show that the bill was ever presented to Mr. Green.

The court, therefore, found that it was never intended that such a bill should be presented, and likewise found that the consideration for these transfers was inadequate.

In view of this evidence; in view of the situation surrounding Mr. Green; in view of the fact that he was close to 81 years of age; in view of the fact that a confidential relation existed between himself and Mr. Niday,

can it be even suggested that the trial court has made any "serious or important mistake in the consideration of such evidence."

If not, then the court's finding in this particular must be affirmed. (222 Fed. 763.)

This evidence establishes the first propositions announced at the beginning of this argument, to-wit, that a confidential relation existed between Mr. Green and Mr. Niday; that the transfers were made; that the consideration was inadequate, and that there existed an opportunity for undue influence.

The next question is whether or not Mr. Green was in such a mental condition that his mind was no longer a safe guide for his actions.

The trial court found that Mr. Green was in a condition of extreme second childhood.

"To use a common phrase, it was an extreme case of second childhood."

Transcript of Record, p. 40.

A detailed review of the evidence would be necessary, in order to ascertain the true mental condition of Mr. Green at the time of these transfers, and we will, therefore, refer but briefly to the evidence.

We have the testimony of Gratia Green Acuff, who was a daughter and a very close and intimate associate

of Mr. Green immediately following the death of his wife down to and including the year 1915.

Her description of her father's failing mental condition from the time of the death of his wife down almost to the time of his death is pitiful and pathetic.

She states that in 1914, after her father was moved to Boise, Idaho, he did not know her on the street.

That at times during 1914 he would endeavor to assist her with reading, but was conscious of the fact that he was no longer able to do so.

That, in the spring of 1916, her father visited her home, and gave every evidence of mental weakness.

Her testimony appears on pp. 64 to 75, inclusive, of the Transcript of Record.

Corroborating Mrs. Acuff is the testimony of George H. Moore (a disinterested party), appearing on pp. 76 to 80 of the Transcript of Record.

Mr. Moore spoke of the failing condition of Mr. Green in 1914.

On p. 83 of the Transcript of Record appears a letter written by John M. Green, a son of R. E. Green, in which it is stated that during the last eighteen months preceding his father's death he would not consider him responsible for anything he might do.

This is one of the heirs who sold out his interest to Mr. Niday and then, while on the witness stand, at-

tempted to protect Mr. Niday, but finally had to admit the correctness of the letter.

Corroborating Mrs. Acuff and his son, John Green, we have the testimony of Carrie Wager, appearing on pp. 87 to 90, inclusive, of the Transcript of Record.

Mrs. Wager took care of Mr. Green from the time he moved to Boise, in the fall of 1914, until the time of his death, and Mrs. Wager describes in detail his failing condition.

On pp. 91 to 93 of the Transcript of Record appears the testimony of a Mrs. Phillips, a neighbor of Mr. Green, who frequently visited Mr. Green's home in 1915, and who corroborates the statements as to his failing mental condition.

On p. 93 and 94 of the Transcript of Record is the testimony of Mrs. Egbert, a sister-in-law of Mr. Green, who in turn corroborates the others as to his failing condition.

On p. 96 of the Transcript of Record appears the testimony of Mr. Patterson, who was a friend and visitor at the home of Mr. Green, and who likewise corroborates the evidence of his failing condition.

On pp. 97 to 100 of the Transcript of Record appears the testimony of Mrs. Ratcliff, who was very well acquainted with Mr. Green for some thirty years, and who stated that during the years 1914 and '15 she had observed Mr. Green's mental condition, and that at times

he would not recognize her until she identified herself to him, although he had known her for thirty years.

She also states that he was unable to carry on a conversation, and that this was contrary to his general reputation and character.

Mrs. Ratcliff has no interest whatsoever in the present case.

Some evidence was offered by the appellant, which is more or less remote in character and by people not closely associated with Mr. Green during this period of time, (with the possible exception of J. L. Niday and his wife).

The trial court had the opportunity of observing the demeanor of these witnesses, their manner of testifying, and this testimony was taken in open court.

The testimony presented to this court is in a condensed printed statement.

Therefore, under the rule of law already announced, this court will not disturb the findings of the lower court as to the mental condition of Mr. Green, unless there is some serious or important mistake discovered in the consideration of the evidence.

The evidence is, however, overwhelmingly in support of the fact that Mr. Green was in a weakened mental condition at the time that he was moved to Boise, Idaho, in the fall of 1914, prior to the execution of the first deed and more than a year prior to the execution of the

second deed, and that such mental condition continued until the time of his death.

It, therefore, cannot be said that there is any want of evidence to support the court's finding as to his mental condition; and on the contrary, the evidence is overwhelmingly supportive of the fact.

This establishes the last element referred to in the beginning of this argument, to-wit, that Mr. Green was a man whose mind was no longer a safe guide for his actions at the time when these deeds were executed and delivered.

SUMMARY OF PLAINTIFF'S EVIDENCE

The plaintiff established by a preponderance of the evidence the following facts:

- 1. That Mr. Green, a man 80 years of age, deeded to the appellant, Niday, two hundred twelve acres of land in which he (Green) had an equity of at least \$3,000.00.
- 2. That the land so deeded was all of the property owned by Mr. Green at the time of the transfer.
- 3. That there existed between Mr. Green and Mr. Niday a confidential relation of attorney and client, confidential adviser, close friendship, and that of son-in-law.

- 4. That the consideration for the transfers was inadequate.
- 5. That the deeds were, for a long time, withheld from public record, and the knowledge of their existence withheld from some of the heirs of Mr. Green.
- 6. That after the deeds were executed and delivered, Mr. Niday got Mr. Green to make an application to the State Land Board of Idaho for a loan of \$5,000.00 and the deeds were withheld from record so that the State Land Board would not know that the transfers had been made.

This is Mr. Niday's own admission.

See Transcript, p. 119.

- 7. That, acting under the direction of Mr. Niday, Mr. Green wrote a letter to a friend, which letter was written against his will, and afterwards he apologized for writing the same.
- 8. That from the time of the death of Mrs. Green, in 1909, down to the time of Mr. Green's death, in 1917, Mr. Green was in a failing mental and physical condition, and unable to take care of himself, either mentally or physically.

These facts not only establish the existence of undue influence, but "from such circumstances imposition or undue influence will be inferred." (249 Fed. 365.)

These facts not only establish a clear case upon the part of the plaintiff, but are supported by the findings of the trial court, which findings will not be disturbed unless this court can say that there was a "serious or important mistake made in the consideration of the evidence". (222 Fed. 760.)

These facts also cast upon Mr. Niday the burden of establishing the regularity of the transaction. (249 Fed. 365.)

"The clearest evidence is required that there was no fraud, influence or mistake". (34 N. Y. 170.)

These facts cast upon Mr. Niday not only the burden, but "the heavy burden of proving that the transaction is characterized by the utmost fairness and good faith, and not tained with fraud or undue influence, and that the client acted upon the fullest information and advice". (255 Fed. 246.)

These facts establish a "presumption against the propriety of the transaction". (34 N. Y. 170.)

The usual way of repelling such presumption is "by showing that the grantor had the benefit of competent and independent advice of some disinterested third party". (65 So. 338.)

With these observations in mind, we will now review very briefly the evidence offered by Mr. Niday to maintain this "heavy burden" of proof.

Mr. Niday testified that in his opinion Mr. Green showed some nervousness, but that he did not think

there was any lapse of memory, and that he talked with Mr. Green almost daily from 1916 until the time of his death, during which time Mr. Green was amply able to carry on a conversation. (See Transcript, p. 105.)

That in November, 1914, he aided Mr. Green in extricating himself from debt by conveying to the First National Bank of Boise, Idaho, all of his property except two hundred twelve acres at Greenhurst and some lots in Nampa.

See Transcript, p. 108.

That afterwards Mr. Green disposed of the lots in Nampa.

See Transcript, p. 108.

That after these transactions were concluded, Mr. Green came to Mr. Niday and told him that he would like to have him take over the property known as Greenhurst, because he, Mr. Green, couldn't handle it.

That Niday told him he would consider the matter, and later agreed to take the property rather than to see it go.

Transcript, p. 110.

That Mr. Niday took the property, stating to Mr. Green that the conditions might sometimes change so that something could be gotten out of it.

Transcript, p. 110.

That thereupon the deed to the property was executed and accepted by Mr. Niday.

Transcript, p. 110.

Mr. Niday then stated that he didn't really want Greenhurst, and went on to explain that Greenhurst was a very poor piece of property.

See Transcript, p. 111.

This is the same Mr. Niday who sold Greenhurst to some of the other defendants in this case for \$30,000.00.

He says that at the present time Greenhurst is not a desirable ranch, on account of alkali and other things.

See Transcript, p. 111.

Yet in December, 1918, he was glad to sell it to the present owners for \$30,000.00.

This is the same Mr. Niday who, in the answer filed in the State Court, virtually admitted that he was the attorney for Mr. Green, while in the answer filed in this case denied that he was the attorney for Mr. Green some time prior to the date when the deeds in question were executed.

See Transcript, p. 30-122.

This is the same Mr. Niday who, while on the witness stand, admitted that in November, 1914, immediately prior to the execution of the first deed in question

he conducted the negotiations for Mr. Green in making conveyances of property in settlement of about \$40,000 worth of indebtedness (See Transcript, pp. 106 and 107), and who looked over the contract for Mr. Green in connection with this transaction (See p. 120, Transcript of Record).

This is the same Mr. Niday who, after he received the deeds from Mr. Green, withheld them from record for a considerable period of time.

This is the same Mr. Niday who gave as his reason for withholding the deeds from record that he did not want the public officials of Idaho to know of their existence, because he wanted to get a loan on the land in the name of Mr. Green.

See bottom p. 119, Transcript of Record.

This is the same Mr. Niday who compelled Mr. Green to write an insulting letter to a friend in Nampa, Idaho.

This is the same Mr. Niday who submitted at this trial a bill for legal services against the estate of Mr. Green in the sum of \$3,000.00 or \$4,000.00, although such bill was not itemized and there is no showing that the bill was ever submitted to Mr. Green.

See Transcript, p. 134.

The lips of Mr. Green are sealed in death, and there is no method of rebutting the statements which Mr. Niday says that Mr. Green made to him.

It is, therefore, necessary to consider the character of the man who seeks to justify these transfers by attributing statements to the grantor.

When we look at the circumstances surrounding the execution of these instruments; when we consider that Mr. Green was a man over 80 years of age; when we consider that he was in a weakened mental and physical condition; when we consider that the deeds were withheld from record; when we consider that Mr. Niday attempted to get Mr. Green to represent to public officials that he was still the owner of the land after the conveyances were made; when we consider that information concerning these transfers was withheld from some of the other children of Mr. Green until after his death, can it be said that the statements of Mr. Niday, contained in this record, establish by the "clearest evidence" that there was no fraud, influence or mistake, and that the transaction was perfectly understood by the weaker party. (34 N. Y. 170; 255 Fed. 236.)

Instead of establishing this burden of proof, the very statements offered by Mr. Niday, himself, show that there was a secrecy and subtlety in connection with the entire transaction.

Mr. Niday stated that Mr. Green was not afraid of him, but on the contrary sought his company.

See Transcript, p. 117.

Does this prove the absence of undue influence?

How could Mr. Niday have exercised undue influence if Mr. Green had not sought his company?

Mr. Niday further testified that he aided Mr. Green in extricating himself from outstanding indebtedness, but at the same time he aided him in creating a new indebtedness of some \$4,000.00 for services already performed, and for which no bill had been rendered.

Is this the clearest kind of evidence by which to establish the absence of undue influence?

Mr. Niday further testified that he took the property to relieve Mr. Green from the mortgages then on it, but he likewise testified that after he had procured the deeds from Mr. Green and before he had recorded them, he attempted to procure a loan from the Idaho State Land Board in the name of Mr. Green as the record owner, while he (Niday) was secretly claiming to be the owner.

In order to have obtained this loan from the State Land Board, he would have had to persuade Mr. Green to make an affidavit that he, Green, was still the owner of the property.

Does this testimony establish the absence of undue influence?

The question answers itself.

The record in this case establishes beyond doubt the high character and standing of Mr. Green, and such a character would not have resorted to the artifice suggested by Mr. Niday.

A man who would go from the City of Boise to Nampa to apologize to a friend for having been compelled to write an insulting letter is not the type of man who would attempt to conceal from his own government the true state of a public record.

If a man of Mr. Green's character would not have done the things suggested by Mr. Niday, then it must have been Mr. Niday, himself, who was inducing Mr. Green to perform these acts.

This character of evidence establishes not only undue influence but positive fraud, and the only weakness of the decision from which Mr. Niday is appealing is the fact that such decision does not charge him with positive fraud.

If a man who openly admits that he was a party to a transaction to conceal the true state of a public record from the officials of the government, is not guilty of positive fraud, then positive fraud can never be established by direct evidence.

In addition to the testimony of Mr. Niday, the appellant offered the evidence of his own wife to establish the absence of undue influence.

This evidence appears upon pp. 135 to 138 of the Transcript of Record.

Her testimony may be summarized in the conclusion that in her opinion her father was not mentally weak during the latter years of his life. In this respect she is disputed by her sister, Julia Green Graef; her sister, Mrs. Acuff; her own brother, Jack Green (See letter, Transcript, p. 83); her own aunt, who lived continuously with Mr. Green, Mrs. Carrie Wager; her own friend and the neighbor of her childhood days, Mrs. Ratcliff; another neighbor, Mrs. Phillips; a disinterested business man, George Moore; her own aunt, Mrs. Egbert; and Dr. Patterson.

Furthermore, while upon the witness stand, Mrs. Niday testified as follows:

"I did not know that he had made the transfer until after the deed was made."

See Transcript, p. 137.

When, however, her attention was called to a letter which she had written to her own sister, she became greatly confused, and her testimony accordingly weakened.

The letter stated, amongst other things, as follows:

"It seems strange to us at this time something like 4 yrs. after Father deeded this property that such a furor should be raised about this business when not a word said during the time Father was here being cared for all of this known during that time the deed having been placed of public record."

See Transcript, p. 151, par. III.

The above letter was signed, "Niday and Mollie".

Mollie is Mrs. Niday.

The letter referred to bears date June 4th, 1918.

(See Transcript, p. 149.)

It says, "something like 4 yrs. after Father deeded the property".

This would go back to June 4th, 1914, several months before the first deed was made.

Does this indicate that Mrs. Niday knew nothing of the transfer prior to the time it was made?

We are reluctant to point out a discrepancy of this character in the testimony of one of Mr. Green's own daughters.

But she is an interested party in this case.

She is the wife of the man who procured these deeds from her own father.

She took the stand against her brothers and sisters to establish on behalf of her husband that her father was fully competent and that no undue influence was exercised over him.

Such evidence not only fails to establish the absence of undue influence, but shows the extremity to which the appellant was driven in order to justify the taking of this property from Mr. Green. Again, on July 5th, 1918, Mr. Niday, himself, wrote to the respondent in this case, and stated, amongst other things, as follows:

"However, I have always intended, and so stated to the members of the family here, after Mr. Green passed away, that if I could sell to advantage I would help the other members of the family, and I still intend so to do."

See Transcript, p. 161.

If there was no undue influence, and if Mr. Niday considered that he had given to Mr. Green dollar for dollar for the property which he took from Mr. Green, and that the transaction was entirely above-board, then why should he at this late date feel either morally or legally obligated to pay to the children any portion of the proceeds.

Furthermore, the following stipulation was made upon the record:

"That prior to the commencement of this suit and prior to the conveyance of the property involved in this suit, the two sons of R. E. Green, deceased, George L. Green and John M. Green, conveyed to the defendant, J. L. Niday, all the right, title and interest which they had or have in and to the premises involved in this controversy.

MR. FRASER: That is all right. It is for the purpose of confirming the title in the purchaser only." See Transcript, bottom p. 217, top. p. 218.

If, as is now contended by Mr. Niday, there was no undue influence and he was the owner of this property, why did he have to purchase the interests of these two heirs?

This fact not only fails to establish the burden cast upon Mr. Niday to show the absence of undue influence, but affirmatively establishes that Mr. Niday, himself, must have considered the title doubtful, because a careful examination of the stipulation will show that he purchased these claims prior to conveying the property away.

It is also a significant fact that the John M. Green who conveyed his interest to Mr. Niday is the same John M. Green who went upon the witness stand in this case and attempted to support Mr. Niday by saying that his father had faith in Niday and was not afraid of him, and then when his attention was called to a letter showing the opposite said, "I was mistaken in the statements contained in the letter." (See Transcript, top p. 82.)

Then, when he was interrogated by the court, he entirely changed his front and said, "That is my letter all right. The letter is true." (See Transcript, p. 84.)

In other words, this son, John M. Green, went upon the witness stand and stated in one breath that the letter was not correct, and in the next breath that the letter was true. This, we say, is the same Mr. Green who conveyed his interest to J. L. Niday, and the reason why we refer to his testimony in this connection is to show the close relation existing between Mr. Niday and this son, John M. Green, which in turn throws light upon the secrecy and subtlety with which Mr. Niday has attempted to surround these transactions.

It is not easy, in cases of this kind, to get at the real facts of the transaction, and it is only by such inferences from the circumstances, showing the relation of the parties, that the true spirit can be discovered.

It must be remembered, we are now discussing the evidence offered by Mr. Niday to show the absence of undue influence.

The evidence thus far referred to not only fails to show the absence of the undue influence, but establishes that character of secrecy and subtlety to which the courts frequently look in dealing with these transactions.

"The secrecy with which the transaction is accomplished often furnishes a badge of fraud."

Crabb vs. Watts, 249 Fed. 357.

In addition to the above testimony of Mr. and Mrs. Niday, the defendant introduced the testimony of Mr. Crawford Moore, who said that at the time when Mr. Green deeded the property to Mr. Moore's bank, in satisfaction of the mortgage indebtedness, that he thought Mr. Green thoroughly understood the transaction.

See Transcript, p. 124.

There is no showing that Mr. Moore was on intimate terms with Mr. Green or intimately associated with him during the time when these transfers were made.

Furthermore, the transfer to Mr. Moore was made in November, 1914, more than a year prior to the time when Mr. Green deeded the two hundred six acres to Mr. Niday.

Therefore, Mr. Moore's testimony can be of little value in determining Mr. Green's condition at the time of the principal deed to Mr. Niday.

In addition to this, Mr. Green was represented by Mr. Niday in his dealings with Mr. Moore, and was undoubtedly acting under the direction of Mr. Niday.

The next witness called was Mrs. Bowers, who stated that she never heard Mrs. Niday speak disrespectfully to her father, and cited as an evidence of Mr. Green's mental capacity, his ability to differentiate between pictures.

Her testimony can hardly stand as against the numerous other witnesses who were so intimately associated with Mr. Green.

It is certainly not that clear character of evidence necessary to prove the absence of undue influence.

The next witness called was Dr. Bowers, who was a family physician for Mr. Green and who testified that

he found Mr. Green normal, and that on Christmas, 1915, he did not notice any failure in Mr. Green's mental facilities.

Dr. Bowers, however, admitted that Mr. Green's daughter, Mrs. Acuff, called on him with reference to her father's condition, and that he tried to impress her that her father was seriously ill.

Dr. Bowers further stated that he did not remember of having told Mrs. Acuff anything regarding her father's mental condition.

But Mrs. Acuff stated that when she called upon Dr. Bowers he explained to her that for two or three years prior to her father's death her father had been undergoing a mental deterioration, which had been coming on for years, and that he, Dr. Bowers, could do nothing for it.

See Transcript, p. 147.

Dr. Bowers did not deny this statement.

He merely expressed an absence of recollection concerning it.

See Transcript, p. 144.

The next witness called was a woman by the name of Mrs. Lore, who testified, as shown upon p. 144 of the Transcript, that she did not see any signs of mental decay in Mr. Green in 1914 and '15.

On p. 148 of the Transcript, however, she said, "I was never there when Mr. Green was real sick."

Her testimony can hardly overcome that of the numerous people so closely associated with Mr. Green, and is not that clear character of evidence necessary to show the absence of undue influence.

The next witness called was Mrs. Nellie Wood.

She testified that she had known Mr. Green for more than ten years.

That she was the notary public before whom he acknowledged the deeds in controversy, and that she, likewise, witnessed the deeds.

That in her opinion Mr. Green was normal at the time when he executed these deeds.

This evidence in no way negatives the theory of undue influence, because he did not discuss the subjectmatter of the deeds with the notary, and merely went through the formal procedure of executing and acknowledging the same.

The witness likewise testified that she had, on prior occasions, taken Mr. Green's acknowledgment, and this would confirm, rather than disaffirm the theory of undue influence, because if Mr. Green was accustomed to go before her it would be the natural place for Mr. Niday to send him, and thereby avoid suspicion.

Furthermore, the evidence derived from the execution of the instrument is not sufficient, as a matter of law, to overcome undue influence.

This has been decided by the Supreme Court of New York in the following language:

"The presumption is against the propriety of the transaction, and the onus of establishing the gift or bargain to have been fair, voluntary and well understood, rests upon the party claiming, and this in addition to the evidence to be derived from the execution of the instrument conveying or assigning the property."

Nesbit vs. Lockman, 34 N. Y. 167, 170.

Nowhere in the record, however, does it appear that Mr. Niday ever suggested to Mr. Green that he seek any independent advice with reference to the execution of these deeds.

The answer filed by Mr. Niday states that he did not know whether or not Mr. Green received any independent advice concerning the contents and effect of the deeds.

See Transcript, p. 35, par. XIV.

If there had been no undue influence and no secrecy, it would have been very natural for Mr. Niday to have said to Mr. Green that owing to the confidential character of their relations he did not desire to accept the

deeds unless some third disinterested person advised him as to the contents and effect thereof.

Not only was it the duty of Mr. Niday to have done this in accordance with the rule laid down by the authorities cited under Par. IX of the Points and Authorities, but it was likewise the duty of Mr. Niday to have advised Mr. Green as to the extent of his equity remaining in the property after the payment of the mortgage and endeavored to aid him in obtaining that equity.

Mr. Niday, as a lawyer, must have known the law in this particular.

The failure to have advised Mr. Green in this particular, and on that subject the record is silent, was an even more flagrant breach of duty on Mr. Niday's part than his failure to have Mr. Green seek independent advice.

The above constitutes the evidence offered by the defendant to overcome the presumption of undue influence.

As already shown by the authorities, such evidence should be very clear and convincing, because the defendant has the heavy burden of proof to establish the utmost fairness and good faith and the absence of any taint of fraud or undue influence. (255 Fed. 246.)

The evidence offered by the defendant falls far short of establishing this burden, and contains facts and circumstances which prove the presence of undue influence and positive fraud. As before stated, all of this evidence was presented to the trial court by witnesses adduced in open court, and the record before this court is in the form of a condensed printed statement.

Therefore, every presumption is in favor of the correctness of the trial court's findings, and they will not be disturbed unless he made some serious mistake in the consideration of the evidence.

Every finding made by the trial court is amply supported by the evidence, and the evidence offered by the defendant, himself, affords ample ground for inferring the existence of fraud and undue influence.

We, therefore, respectfully assert that the findings of the court are amply supported by the evidence, and that the defendant has utterly failed to maintain the burden of proof resting upon him to show that degree of fairness and good faith which is required between parties where one of the parties is acting in a confidential capacity.

It certainly cannot be said that the trial court made any serious or important mistake in his consideration of the evidence, and the appellant will certainly fail to point out to this court any such serious or important mistake.

Under such conditions, the findings should be affirmed. (222 Fed. 763.)

The only remaining question is whether or not the court made an "obvious error" in the application of the law. (222 Fed. 763.)

The rule of law applied by the trial court to this state of facts is set forth in the body of the court's opinion, beginning at the bottom of p. 45 of the Transcript of Record.

The rule announced in the cases cited by the trial court has been so universally approved by all of the appellate courts of the United States, including this court, that we deem it entirely unnecessary to enter into any detailed review of the authorities, but the case of Strong vs. Goss, 62 Mo. 226, is so analogous in point of fact that we will make a brief reference to it.

This was a case to set aside a deed given by a woman to her son-in-law and his wife, the latter being the daughter of the grantor.

The alleged consideration for the transfer was the fact that she had been harrassed by the pressure of debts, amounting to about \$4,000.00, most of which were secured by a deed of trust on the property conveyed.

The tracts conveyed were worth \$9,200.00 more than the amount mentioned in the deed.

There was evidence to show that the son-in-law had agreed to assume the debts of his mother-in-law, although he was only worth about \$700.00.

There was further evidence to show that he collected rent upon the property, acting as the agent of his mother-in-law.

There was also evidence that the mother-in-law still regarded herself as the owner of the land up until the time of her death.

In spite of this evidence, the court found that the conveyance could not stand.

One fact which impressed the court was the continued poverty of the mother-in-law down to the time of her death, in spite of the fact, claimed by the defendant, that he had taken the property to relieve his mother-in-law of her obligations, and afford her ample means of support.

The court concluded on this state of facts that the defendant must show,—

"that absolute fairness, adequacy and equity characterized the transaction. The rule on this point is of universal recognition, and finds application commensurate with the existence of confidential relations. It, however, is chiefly invoked between parent and child, client and attorney, principal and agent, and patient and medical advisor; though, as before stated, it is by no means confined within such narrow limits. There exists, therefore, no necessity to show fraud, or imposition practiced on him who bestows the confidence; but simply to show that during the pendency of such intimate relations the conveyance in question was made. This being done, all of the above mentioned consequences as to the onus of proof attended the given transaction as inevitable incidents."

Strong vs. Goss, 62 Mo. 226.

The above case is strikingly analogous to the case at bar.

We, therefore, respectfully urge that the trial court not only did not make any obvious error in the application of law, but merely applied a universal principle.

We urge that the deeds in controversy should have been set aside, even though there was no undue influence or fraud, and even though there was no inadequacy of consideration, because the case at bar has the three elements constituting the presumption against a purchase by an attorney of his client's property, regardless of all other elements.

These three elements are as follows:

- 1. A fiduciary relation.
- 2. A deed of conveyance.
- 3. An opportunity for undue influence, which means, "not to presume fraud or coercion or any act which is malum in se, but simply the continuance of the influence which naturally inheres in and attaches to the relation itself." (154 S. W. 121; 65 So. 338; 142 Ala. 587.)

It, therefore, follows that the rule of law applied by the trial court was a correct rule, even if the court had not found the existence of undue influence.

In the case at bar, however, the evidence of undue influence is too strong to be questioned, even by the appellant himself.

There existed the relation of attorney and client.

There existed the relation of confidential advisor.

There existed the relation of life-long friend.

There existed the relation of son-in-law.

There existed, under Mr. Niday's own admissions, an influence upon his part which tried to persuade Mr. Green to represent to public officials that he was still the owner of the land after he had conveyed the same to Mr. Niday.

There existed an influence which caused Mr. Niday to submit to the heirs of Mr. Green a professional bill for \$3,000.00 or \$4,000.00, which bill was unitemized and had never been presented to Mr. Green, while at the same time Mr. Niday was denying the relation of attorney and client in the years 1914 and '15.

If, as stated in Mr. Niday's answer, the relation of attorney and client had ceased between himself and Mr. Green prior to December 22, 1914, and prior to October 1st, 1915, the date of the deeds, (See Transcript, p. 30, par. IV) and as asserted by Mr. Niday, Mr. Green was in full possession of his faculties, then why did not Mr. Niday present his bill to Mr. Green?

It must also be remembered that these deeds were for a considerable time kept from the public record.

It must also be remembered that Mr. Niday prepared the deeds himself.

It must be remembered that Mr. Green went to a notary public in the same building where Mr. Niday had his office.

It must be remembered that this was a notary public to whom Mr. Green was accustomed to go.

This shows how all the transactions involved were within the close surveillance of Mr. Niday.

The above pieces of testimony and circumstances, however fragmentary in character, make a completed whole when pieced together, and point strongly to a continued influence at work.

By the logical processes of elimination, only three people appear in the transactions:

R. E. Green, J. L. Niday and Mrs. J. L. Niday.

We, therefore, respectfully contend that regardless of the failure of the defendants to overcome the powerful presumption of undue influence arising out of a confidential relation, the evidence introduced upon the trial, and the logical inferences to be deduced therefrom, positively establish the existence of fraud and undue influence.

We also respectfully contend that there is sufficient evidence of undue influence and fraud to warrant setting aside the deeds in controversy, even if the consideration had been adequate, because we have present the three elements, a fiduciary relation, a deed of conveyance to the confidential advisor, and an opportunity for undue influence. (154 S. W. 121.)

We also have a weak man who has conveyed all of his property, leaving himself to be fed and clothed at the pleasure of some other party. (21 Md. 352.) We also have a conveyance from a client to an attorney given without "the fullest information and advice." (255 Fed. 242.)

We also have a case where the transaction was not perfectly understood by the weaker party. (34 N. Y. 167.)

We also have a case where the weaker party received no independent advice of a third disinterested party. (65 So. 337.)

We also have a case where the grantor made no reasonable provision for his own children, not even for himself. (207 S. W. 695.)

We likewise have a case where the fact of the existence of the deeds to the confidential advisor was withheld from several of the heirs until after their father's death.

The case certainly comes within the rules of law announced by the decisions which have been cited and which seem to represent a universal harmony of opinion.

Not only does the case come within the purview of the doctrine announced, but we likewise have a case which seems to us to possess all the elements of positive fraud, and it is our opinion that the court should have so held.

It is difficult for one to understand how there could be a distinction between positive fraud and undue influence in a case where the undisputed record shows that the defendant influenced an old man almost 80 years of age to misrepresent to public officials the true state of a public record.

We, therefore, urge not only that the decision of the trial court should be affirmed, but that a finding should be made charging the appellant with actual fraud in the transaction, and thereby deprive him of the benefits which he has reaped out of the very fraud which he perpetrated.

LACHES

The appellant contends that the court erred in not finding that the respondent was guilty of laches.

The case in the State Court was started in January, 1919, a little over six months after the plaintiff learned of the existence of the deeds.

She first learned of these deeds in April of 1918.

See Transcript, top p. 59-60.

Some time was occupied in negotiations with reference to an adjustment of the controversy.

After the case was started in the State Court, new conditions arose which brought about the institution of the present litigation in March, 1920.

The trial court found against this contention of laches, and this finding, based upon all the circumstances,

is supported by enough evidence to warrant its affirmance.

The defense of laches is used to promote justice, but never to defeat justice, and is never applied unless unusual conditions require its application. Smith vs. Smith, 224 Fed. 1, 6. (C. C. A. Ninth Circuit.)

Furthermore, the case at bar was begun in January, 1919, within approximately six months after the plaintiff discovered the deeds, during which time she was negotiating for a settlement, and would have been tried in the county where the property was situated had not the defendant delayed the matter by requiring its removal to the City of Boise, where there was a more congested court calendar.

Furthermore, Mr. Niday, himself, made no detailed explanation of the conditions until July 5th, 1918, over a year after the death of Mr. Green. (See letter, p. 156, Transcript of Record.)

Where the party interposing a defense of laches "contributed to or caused the delay, he cannot take advantage of it." Nor. Pac. vs. Boyd, 177 Fed. 804, 824. (C. C. A. Ninth Circuit.)

Even the other two children, Mrs. Acuff and Philo F. Green, who assigned their interest to Mrs. Graef, and who learned of the deeds shortly after their father's death, did not have any means of ascertaining the true facts concerning the situation.

They were apparently relying upon Mr. Niday as a member of the family and as a lawyer.

Under these circumstances, a negligent delay amounting to laches could not be imputed to these parties, because at most the transaction was instituted within the period of the statute of limitations of the State of Idaho.

As before stated, however, the court's finding in this particular was against the defense of laches, and the court's review of the facts surrounding the institution of this litigation is very full and complete. (See pp. 46, 47, Transcript of Record.)

These findings are amply supported by the evidence, and should be affirmed.

RIGHT OF PLAINTIFF TO MAINTAIN SUIT AS ASSIGNEE.

Appellant contends that the plaintiff did not have a right to maintain the present suit in the Federal Court as assignee of the interests of her brother and sister.

The trial court went into this question carefully, and determined from the evidence that there had been a bona fide transfer of these claims to the plaintiff without the retention by the assignors of any interest in the litigation.

The court's finding in this particular is supported by evidence, and is therefore binding and comes directly within the case of Dickerman vs. Northern Trust Co., 176 U. S. 181, where it is held that in the case of such an assignment the court will not inquire into the motive of the assignment if a consideration was actually paid.

This assignment was the assignment of an interest in a trust estate, and is such a right as can be maintained by an assignee in the Federal Court.

This was decided in the recent case of Brown vs. Fletcher, 235 U. S. 589.

We, therefore, urge that the ruling of the trial court on this question of assignment was proper and should be affirmed.

The defendant also made objection that the plaintiff had not offered to do equity, and could therefore not maintain her bill.

As the trial court suggested, however, if this objection had been raised at the threshold the plaintiff might have been required to make such an offer by amendment; but that, under the circumstances, the question was not raised until after the trial, and the court had jurisdiction to determine an accounting which would do equity to all parties.

The court's finding in this particular is so equitable (See Transcript, p. 48) that further comment upon the subject is not necessary.

This disposes of all the contentions presented by the appellant.

This is a court of equity.

Is such a court of equity going to say to the appellee, in accordance with the contention of counsel for the appellant, "It is true that Mr. Green's mental faculties were impaired; it is true that he was not capable of transacting business as in former days; it is true that the consideration was not entirely adequate; it is true that Mr. Green did not give full consideration to the effect of these deeds; it is true that by giving these deeds he pauperized himself entirely; it is true that a man wholly in possession of his faculties would not, under the history of this case and the circumstances of the execution of these deeds, have voluntarily surrendered his last vestige of property; it is true that there is no evidence of an understanding upon the part of Mr. Niday to support Mr. Green; it is true from the face of the record in this case that Mr. Niday did not support Mr. Green; it is true that suddenly, and without any previous discussion, Mr. Green, though in financial straits, determined to pay to Mr. Niday, his own son-in-law, (according to Mr. Niday's own testimony) a large sum of money for professional services, for which no claim has ever been made, and which sum is now brought forth by the said Niday as part of the consideration for the deeds; it is true that a confidential relation of an unusually close nature existed between Mr. Green and Mr. Niday, that of fatherin-law and son-in-law, that of attorney and client, that of friend; it is true that under the testimony most strongly in favor of the appellant, Mr. Green had a minimum unincumbered equity in the property of \$3,000.00; it is true that a deed to an attorney from a

client is looked upon with suspicion, and the law demands that the client and weaker party must fully and completely understand the nature of the transaction, and when the stronger party is an attorney, should have the benefit of independent advice. (65 So. 338.) It is true that even one heir may maintain an action to set aside an ancestral conveyance procured by undue influence, (Harding vs. Hardy, 11 Wheat 103, Smith vs. Meaghan, 28 Hun. 424); it is also true that the appellants have waived any question as to the capacity of the appellee to sue by pleading over (141 U. S. 127); but nevertheless, this court as a court of equity says to you, as an injured heir of R. E. Green, 'Go hence; the law affords you no remedy'."

Or will this court say, as did the trial court in the language of its time-honored maxim that "For every wrong, equity affords an adequate remedy."

Respectfully submitted,

PLATT & PLATT, MONTGOMERY & FALES,
Solicitors for the Plaintiff.
HUGH MONTGOMERY,
Of Counsel.

BRIEF OF CROSS APPELLANT.

STATEMENT

After the rendition of the decision in the present case a hearing was held with reference to the determination of the accounting between the parties which was provided for in the decision of the court.

This accounting occurred after the trial, and the appellee took certain exceptions to the rulings of the court in reference to the account which the court ordered.

The exceptions referred to are fully set forth in the assignment of errors appearing upon pp. 263 to 266, inclusive, of the Transcript of Record.

We will, therefore, discuss these exceptions in the order set forth in the assignment of errors.

Assignment I.

After the first hearing, held before the court on the subject of accounting, the court entered an interlocutory decree, which appears on pp. 50 to 54, inclusive, of the Transcript of Record.

This interlocutory decree provided that the deeds in question were voidable at the instance of the grantor and his heirs, and then confirmed the title in the purchasers of the property, who had purchased the land from the appellant, Niday.

The final decree, which appears upon pp. 54 to 56, inclusive, of the Transcript of Record, follows the interlocutory decree in this particular.

The prayer of the plaintiff's complaint was for a decree declaring null and void the deeds from Mr. Green to Mr. Niday, or for a decree declaring that Mr. Niday held the property in trust for the plaintiff.

The court refused to enter the decree proposed by the plaintiff, as shown on p. 255 of the Transcript of Record, setting aside the deeds, and adopted the latter theory of a constructive trust in favor of the appellee.

The appellee had agreed upon the trial of this case that if a decree was entered in her favor, her title might be quieted in the purchasers of the property.

These purchasers had pleaded the defense of bona fide purchasers for value, and the appellee expressed a willingness to accept this sale without compelling them to prove their defense.

She, therefore, made the stipulation suggested.

In view of the fact, however, that the court had refused to enter a decree setting aside the conveyances, and had instead declared that Mr. Niday was a trustee for the benefit of the plaintiff, to the extent, at least, of the interests represented by her, the appellee insisted that Mr. Niday should be compelled to account for the profits arising out of the transactions since the date when he acquired the property.

This request was presented in the form of a proposed decree, and appears at the top of p. 258 of the Transcript of Record.

This the court refused to do, and is the principal objection raised by the cross appellant.

The trial court determined as a question of fact, and concluded as a proposition of law, that owing to the existence of a confidential relation between Mr. Niday and Mr. Green, and the existence of a species of undue influence arising out of said relationship, that the transfers in controversy could not be sustained.

Having determined this proposition, the court was compelled either to set the deeds aside or to declare a constructive trust in favor of the plaintiff.

In view of the situation of the parties and the willingness of all parties to protect the purchasers of the property, the court adopted the latter remedy.

It appeared by the stipulation of the parties, however, that Mr. Niday had purchased the interest of two of the heirs of R. E. Green, in his own right, before he made a sale of this property.

He, therefore, made such purchase while a legal trustee of the heirs of R. E. Green.

Under such circumstances, he could not be permitted to make any profit out of the transaction.

See Baker vs. Schofield, 221 Fed. 322 (C. C. A. Ninth Circuit).

The record does not show what amount Mr. Niday paid to these heirs for their respective interests, because he was not compelled to account in this particular.

But we are advised that he paid to each of them the sum of \$1,500.00, either in cash or its equivalent.

Each of these heirs was entitled to a one-sixth interest in the \$30,000.00 for which the property was sold, after deducting moneys actually advanced by Mr. Niday.

If this interest was of greater value than the amount Mr. Niday paid for such interest, then he should account to the other heirs for the profit which he made out of the purchasers.

Because, under the decision above cited a trustee cannot become the purchaser of the trust property and make a profit out of the transaction.

This rule was also announced by the Supreme Court of the United States in the famous case of Michoud vs. Girod, 4 Howard 504.

In addition to this, Mr. Niday should be compelled to account to the heirs for any profit which he made out of the sale of the property to the other defendants in this case.

The trial court refused to order this form of accountang, and we respectfully urge that the court was in error in this particular, and that a decree compelling such an accounting should be entered by this court.

The trial court found that Mr. Niday was guilty of violating the confidential relation which existed between himself and Mr. Green.

This made Mr. Niday a wrong-doer in procuring these deeds from Mr. Green.

Nothing which he did thereafter could change his position in this particular.

Therefore, under no circumstances should be awarded a profit for his wrong-doing.

The most that Mr. Niday would be entitled to would be the actual moneys he had spent in preserving the property, without sharing in the profits of the sale.

Under the decree actually entered by the trial court, Mr. Niday was not only given back the moneys which he spent in preserving the title to the property, but was likewise permitted to share in the profits of the transaction.

We respectfully urge that the decree of accounting should be reformed in this particular.

All the profits which were made out of this transaction should go to the heirs of Mr. Green, who were injured in the first instance by the wrongful act of Mr. Niday.

Assignment II.

The court awarded to Mr. Niday the sum of \$900.00 as money alleged to have been paid to Mr. Green in connection with the conveyance of the six acres, being the deed dated December 22, 1914.

This sum was worked out upon the theory that it was the proportionate value of the six acres to the two hundred twelve, figuring on the basis of \$150.00 an acre.

In his original decision, the court held that the rules of law which he had announced as invalidating the transfers in question included the six acres as well as the two hundred six acres.

In other words, it included the deed of December 22, 1914, as well as the deed of October 1st, 1915.

On the hearing in reference to the accounting, however, Mr. Niday attempted to point out some particular testimony which he had given in reference to the first deed.

This particular testimony appears on the bottom of p. 118 and the top of p. 119 of the Transcript of Record.

In other words, Mr. Niday tried to show that at the time when the first deed was executed, Mr. Green said that he would be in need of money, and therefore executed to Mr. Niday a deed to the six acres on the theory that Mr. Niday would thereafter advance to him some money as a consideration for this deed.

Now, the fact remains that the deed itself recited a consideration of \$1.00, as found by the court in his original opinion.

Furthermore, Mr. Niday attempted to state in the earlier part of his testimony (See top of p. 118) that he had advanced a considerable sum of money to Mr. Green from time to time, although it appears that a large part of such moneys was for taxes and interest in connection with the property in controversy.

But this claim for moneys advanced was never presented to the Probate Court, where Mr. Green's will was probated by Mr. Niday, himself, and was reserved as a defense to the present trial.

In his main decision, the trial court held that owing to the circumstances and the confidential relation existing between Mr. Niday and Mr. Green, that no theory had been advanced upon which the transfers could be allowed to stand, because taking the property at its lowest valuation there was an equity in favor of Mr. Green of some \$3,000.00, and that, therefore, this \$3,000.00 would have been enough to take care of his expenses.

For this reason, the trial court very properly refused to allow Mr. Niday to make an offset of the \$2,800.00 which he claims to have advanced to Mr. Green, but he did allow Mr. Niday a portion of that offset to the extent of the six acres which Mr. Green deeded to Mr. Niday.

Now, the six acres which Mr. Green deeded to Mr. Niday was the only unincumbered property which Mr. Green had.

If Mr. Niday had been really acting in the interests of Mr. Green, he should have gone out and endeavored to sell this six acres for Mr. Green, or else get him a loan of money on this six acres.

Instead of doing this, however, he took a deed to the property while the confidential relation existed, without in any way advising Mr. Green as to the effect of the deed or without in any way attempting to get a loan for him on the property, and then when the lips of Mr. Green are sealed in death and his heirs seek to question these transfers, the same man who took the property from Mr. Green now attempts to assert on the witness stand that there was a definite understanding between himself and Mr. Green as to moneys to be advanced in connection with this six acres.

If the trial court did not believe Mr. Niday when he said Mr. Green owed him \$3,000.00 or \$4,000.00 for legal services, and did not believe him in connection with the other transaction, neither should he have believed him when he said, as shown at the bottom of p. 118 of the Transcript of Record, that he had a definite understanding with Mr. Green regarding this six acres.

This is especially true when the heirs of Mr Green have no means of rebutting this testimony, and when the

deed itself did not recite such a consideration, and when it appears, as already shown that Mr. Niday withheld this deed from record from its date, December 22, 1914, until the spring of 1916, and then concealed the existence of this deed from the heirs of Mr. Green, and likewise attempted to conceal the transfer from the State Land Board.

Furthermore, at all stages of the transaction Mr. Niday has treated the transfers as an entirety, and finally sold the whole property as an entirety, including the six acres, for the sum of \$30,000.00.

Under such circumstances, we respectfully urge that there is no way of segregating the six acres from the balance of the property, and therefore this allowance of \$900.00 should not be given to Mr. Niday.

It is impossible to understand why Mr. Niday should have been allowed this \$900.00 instead of any other sum.

Under the decree of the trial court, Mr. Niday became a trustee of the title for the benefit of the plaintiff, and was given the actual moneys spent by him in preserving that title for the plaintiff.

We cannot understand on what theory any other sum should be awarded to him.

Any claim which Mr. Niday had against the estate of Mr. Green for personal advances has nothing to do with the trust relation existing between Mr. Niday and the appellee in reference to the property involved in this case.

If Mr. Niday had a legitimate claim against the estate of Mr. Green for \$900.00 advanced in connection with this deed for six acres, he should have presented it to the Probate Court in Idaho when the will of Mr. Green was probated.

We respectfully urge that the decree should be reformed in this particular.

Assignment III.

The above assignment discloses that the trial court awarded to Mr. Niday the sum of \$900.00 for personal services in supervising the property in controversy during the time when he held it.

Now, it appears that Mr. Niday claimed this property under the deeds from Mr. Green.

It further appears that he procured a half interest in the property before he sold it, by deeds from the two sons of Mr. Green.

(See top of p. 218, Transcript of Record.)

The property which the decree of the court awarded to the appellee was obtained by undue influence.

Now, if Mr. Niday owned the property, he certainly should not be given \$900.00 for supervising his own property.

If he improperly obtained the title as the court held in his decision, then certainly he should not be entitled to \$900.00 or any portion of it for supervising property which he had wrongfully taken from Mr. Green.

The sum of \$450.00 or half of this \$900.00 was charged to the appellee.

Again, a trustee is not entitled to a commission for wrongfully dealing with the trust property.

By making this sale, he compelled the plaintiff to accept the same, in order to protect innocent purchasers.

He should not receive a commission for placing the plaintiff in this situation.

On either theory, we think this was an improper charge, and should not have been allowed.

Assignment IV.

Assignment IV discloses that the court allowed to Mr. Niday a commission of \$1,500.00 for selling the property to the defendants Green and Buell.

One-half of this was charged to the appellee, or the sum of \$750.00.

Certainly Mr. Niday should not be allowed a commission for selling his own property.

Certainly he should not be allowed the sum of \$1,500.00, or any other sum, for selling property which he had wrongfully taken from the appellee.

This would again be rewarding a man for his own wrong-doing, because the appellee did not employ him to sell her property, and she might doubtless have made a better sale, or perhaps have preferred to take the property itself.

Furthermore, a trustee is not entitled to compensation for violating his trust.

In any event, we earnestly urge that this was not a proper allowance to a wrong-doer, and that the decree should be reformed in this particular.

Assignment V.

Assignment V relates to interest allowed on moneys which Mr. Niday advanced.

Mr. Niday asserted that he had paid out certain sums in preserving the property.

This money was composed of taxes and other items.

Undoubtedly, Mr. Niday would be entitled to a credit for moneys actually advanced; but the court not only gave him the moneys which he actually advanced, but gave him interest on those moneys in excess of the statutory rate provided for by the laws of the State of Idaho.

That statutory rate is seven per cent.

The court allowed him eight per cent.

In other words, the court gave him a profit of one per cent on all the moneys which he had avanced in preserving the property which he had wrongfully taken from Mr. Green.

We again assert that a trust violator is not entitled to recover profit from his wrong-doing (221 Fed. 322).

We, therefore, respectfully assert that the decree should be reformed in this particular, and that Mr. Niday, if he is allowed any interest at all, should be confined to the statutory rate.

Assignment VI.

Assignment VI refers to the amount of money which the appellee was compelled to deposit, in order to get a return of the property which had been unlawfully taken from her father.

The sum thus allowed was made up of moneys advanced, together with the various allowances already referred to, and then half of it was charged to the appellee.

Under the interlocutory decree entered by the trial court the appellee was compelled to deposit the sum of \$4,313.47 to the credit of Mr. Niday, before she was entitled to a decree.

(See Transcript, bottom p. 53.)

The court further held that if she did not make this deposit, that her case would be dismissed with prejudice.

In other words, the appellee established to the satisfaction of the court that Mr. Niday had improperly taken this land from her father, and that there was no theory upon which the transaction could be allowed to stand.

(See bottom p. 44, Transcript of Record.)

But before she was allowed to gain the benefit of her rights and to obtain the property which had been unlawfully taken from her, she was compelled to put up this large sum of money even without any chance to appeal and have the question determined.

Fortunately, the appellee was able to borrow this money from her husband, and deposited the same under protest.

(See p. 254, Transcript of Record.)

We respectfully urge that a trust violator was not entitled to this protection, and that the appellee should have been allowed, as suggested in the proposed decree presented by her, to have whatever moneys were owing to Mr. Niday by way of advancments charged against her share of the mortgage outstanding against the property.

In other words, Mr. Niday procured one-half of the property in controversy by deeds from some of the heirs of Mr. Green, while a trustee.

Thereafter, he sold the half thus procured, together with the half that did belong to him.

He made certain advancements to preserve the property.

These advancements were voluntarily made.

Therefore, the most that he could claim by way of reimbursement would be the right to have his legitimate charges for reimbursement taken out of the share of the proceeds coming to the appellee when the mortgage was finally paid.

If any other rule was applied, then we would have a situation where an injured heir might make out, as she did in this case, that the property of her father had been improperly taken from her.

Yet, before she could obtain that property, she would be compelled to advance a very large sum of money.

She would be compelled to buy her legal rights.

If this rule was allowed to stand, then no person without money could ever recover their rights.

Assignment VII.

Upon the hearing for an accounting, the appellee presented to the court an itemized statement of expenses which she had been compelled to pay out in order to maintain the present action.

These expenses were composed of \$413.64, which was actually paid out by the appellee in traveling and

other expenses in going from Portland to Boise, Idaho, to take care of this litigation, and likewise the sum of \$1,500.00 as attorneys' fees.

These claims the court denied upon the ground that the appellee should be confined to her statutory costs.

The court also suggested that Mr. Niday had not been guilty of such fraud as required the imposition of a penalty.

But when we consider the findings of the court, the fact that Mr. Niday had induced Mr. Green to make a false affidavit to public officials regarding a public record; had withheld these deeds for a long time; had concealed them from the heirs of Mr. Green; and had attempted to resell this property at a big profit, it seems to us that Mr. Niday was guilty of the grossest kind of fraud.

Under such circumstances, we feel that the appellee should be compensated, in addition to her statutory costs, for the actual moneys which she had been compelled to spend in recovering her rights.

These items are set forth on p. 215 of the Transcript of Record.

We respectfully urge that the decree should be corrected in this particular, allowing such items as an offset on the claims if Mr. Niday is allowed any profit in the transaction.

Assignment VIII.

Assignment VIII is practically a duplicate of Assignment VI, and urges that the court was incorrect in requiring the plaintiff to deposit a large sum of money before obtaining a decree, and thereby shutting her off from the right to have such action reviewed on appeal, without the payment of money.

Assignment IX.

Assignment IX deals with the same subject of allowing Mr. Niday any profit out of the transactions involved in this case.

We desire to cite the following rule:

"If an agent to sell effects a sale to himself under the cover of the name of another person, he becomes, in respect to the property a trustee for the principal, and at the election of the latter, seasonably made, he will be compelled to surrender it, and if he has disposed of it to a bona fide purchaser to account, not only for its real value, but for any profit realized by him on such sale."

Baker vs. Schofield, 221 Fed. 322, 332 (C. C. A. Ninth Circuit).

Under the decision rendered by the trial court in this case, Mr. Niday violated the fiduciary relation existing between himself and Mr. Green.

By virtue of that violation, he became interested in the property not only by virtue of the deeds from Mr. Green but by virtue of purchases subsequently made from some of the heirs of Mr. Green.

Therefore, under no circumstances should he be allowed to make any profit out of the transactions.

This is doubly true in a case like the present, where Mr. Niday was guilty of the gross acts of fraud already suggested.

We, therefore, respectfully urge that the decree in question should be reformed by eliminating therefrom the allowance of \$900.00 in connection with the first deed; the allowance of \$900.00 for supervising the property; the allowance of \$1,500.00 as a commission for selling the property; the allowance of eight per cent on moneys advanced; the allowance of \$4,313.47 in cash, which allowance, if any, should be charged against the proceeds arising from the mortgage, and by eliminating therefrom any profit to Mr. Niday growing out of the transactions involved in this case.

The decision of the court and the main decree should be affirmed, but the order of accounting should be modified in the particulars suggested.

Very respectfully submitted,

PLATT & PLATT, MONTGOMERY & FALES, Solicitors for Appellee.

HUGH MONTGOMERY,

of Counsel.

ADDENDA

After the preparation of this brief, we received a copy of the brief for appellant, which sets forth as the principal ground for the reversal of this decision the defense of laches.

Appellant's brief contains copious quotations from numerous decisions announcing the doctrine of laches.

All of these decisions may be distinguished from the case at bar.

In accordance with the decree of the trial court, the appellant became a trustee of the title to the real property involved, for the appellee, by virtue of a constructive trust arising from a violation of the confidential relation existing between Mr. Niday and Mr. Green.

Mr. Niday virtually admitted the existence of the trust, in the following language:

"However, I have always intended, and so stated to the members of the family here, after Mr. Green had passed away, that if I could sell to advantage I would help the other members of the family, and I still intend so to do. In this all will be treated alike without discrimination. * * * I will carry out the purpose above stated, not as a legal obligation, but with the feeling that if I make something out of the property I would like for the children all to share in it, not equally with me, as I am the one who assumed the responsibility and took the risk, but substantially."

Transcript, p. 161.

The doctrine of laches, as applied to such a situation, has been set at rest by the Supreme Court in the following language, which has already been referred to in this brief:

"* * Within what time a constructive trust will be barred must depend upon the circumstances of the case. There is no rule in equity which excludes the consideration of circumstances, and, in a case of actual fraud, we believe no case can be found in the books in which a court of equity has refused to give relief within the life-time of either of the parties upon whom the fraud is proved, or within thirty years after it has been discovered or becomes known to the party whose rights are affected by it."

Michoud vs. Girod, 4 Howard 504, 561.

Therefore, none of the cases which counsel for the appellant has cited in any way applies to the case presented by this record.

Even, however, if the decree in this case had directly set aside these deeds for fraud and undue influence, nevertheless the cases cited by counsel for the appellant would, in our opinion, be inapplicable.

The following observations distinguish these cases:

The first case cited by counsel for appellant is the case of Harris vs. McGovern, 99 U. S. 161.

This was an action in ejectment, and the court applied the regular statute of limitations to a law action.

Meeks vs. Olpherto, 100 U. S. 564, was a law action to recover possession of real property, and the court applied the statute of limitations.

Castro vs. Geil, 42 Pac. 804, 805, specifically states that "the doctrine of laches, as applied in equity, need not be considered."

Chicago T. & M. C. Co. vs. Tillington, 19 S. W. 474, specifically states that "fraud prevents the operation of limitation only so long as it remains undiscovered."

In the case at bar, the withholding of the deeds from record, then secretly recording them, was no notice of the fraud.

It almost decived the state officials, according to Mr. Niday.

Morgan vs. Morgan, 38 Pac. 1054, specifically points out that the trial court found that plaintiff had "discovered all the facts constituting the fraud more than four years before the commencement of the action. She had enough actual knowledge to set the statute running."

This was a pure question of fact, and contrary to the findings of the trial court in the present case.

Swift vs. Smith, 79 Fed. 709, specifically states on p. 713 of the opinion that there had been a delay in the

action from 1871 to 1891 and that the plaintiff was "not the victim of any actual fraud or of any concealment".

All the facts were within her reach.

Such facts were entirely different from the case at bar.

Ware vs. Galveston City, 146 U. S. 102, specifically stated that the cause of action arose in 1841 or '42; that in 1854 and in 1858 the plaintiff obtained information enough to put him on inquiry, and the suit was not commenced until twenty-three years thereafter.

To this state of facts, the court applied the doctrine of laches.

There is no analogy between this case and the case at bar.

Teal vs. Schroeder, 158 U. S. 172, holds that after twenty-four years of undisputed possession of land the statute of limitations of California shuts out the claims of all other persons.

This is the established doctrine of adverse possession, and has no analogy to the case at bar.

The case of Moore vs. Nickey, 133 Fed. 289, decided by Judge Gilbert, specifically found that the bill of complaint which was for the delivery of certain certificates of stock was not filed for more than nine years after the instrument upon which the suit was brought.

On this state of facts, and on the peculiar circumstances surrounding the immediate case, the court applied the doctrine of laches.

Furthermore, the case held that there was no allegation or proof that any of the defendants deceived the plaintiff as to the extent or cessation of the mining operation or as to the value of the property.

This case is altogether without any analogy to the case at bar.

The case of Tilton vs. Bader, 164 N. W. 871, set forth on p. 21 of appellant's brief and so strongly relied upon by the appellant, is a case from which it specifically appears that "conceding all parties connected with the case were aware of the making of the deed the day signed, more than five years and less than ten had elapsed when the action was begun".

The case then goes on to hold that a suit to set aside a deed obtained by fraud is an action to recover real property, and therefore did not, under the laws of the State of Iowa, have to be brought until ten years after the cause of action accrued.

On the theory of this case, the present case would not have to be brought until five years after the action accrued, because that is the statute of Idaho governing actions for the recovery of real property.

Therefore, even on appellant's own theory the plaintiff began her original action in Canyon County in January, 1919, which was considerably less than five years from the date of the first deed.

The present case was afterwards instituted in the Federal Court, in March, 1920, whereas the second and larger deed was not made until October 1st, 1915, which would determine that the statute did not run until October 1st, 1920.

Therefore, the present action was brought within the proper period of time, assuming that the statute began to run on the dates of these deeds.

Therefore, this very case supports the position of the appellee, and not that of Mr. Niday.

This case, however, in no way changes the old and well established rule that fraud stays the running of the statute until its discovery.

If the rule were otherwise, then anyone might procure a deed by fraud and avoid the fraud by recording the deed.

Such cannot be the law, and equity has always relieved from fraud not apparent on the record.

Furthermore, none of the cases above cited changes the rule laid down in

Michoud vs. Girod, 4 Howard 502.

Baker vs. Schofield, 221 Fed. 322, 334 (C. C. A.,
Ninth Circuit).

In the case at bar, the decree of the court did not set aside the deeds, but awarded to the plaintiff an interest in the securities, on the theory of a constructive trust.

Therefore, laches would not run during the life-time of either of the parties following the discovery of the fraud.

In addition to this, all of the cases above referred to, as cited by the appellant Niday, have an entirely different state of facts from the case at bar.

Furthermore, as already set forth in our original brief, the doctrine of laches is never invoked to defeat justice, and never applied unless unusual conditions require its application.

Smith vs. Smith, 224 Fed. 1, 6 (C. C. A., Ninth Circuit).

Again, the party interposing a defense of laches cannot take advantage of it if he has contributed to the laches.

Nor. Pac. Co. vs. Boyd, 177 Fed. 804, 824 (C. C. A., Ninth Circuit).

The other cases cited by the appellant on the question of tendering equity have no application to the case at bar, because the court required the plaintiff to make a tender and return to the defendant of all benefits received, as a condition precedent to the entry of the decree.

Furthermore, if it was necessary that the complaint be amended to show a tender of equity, such amendment could be made at any time, even in this court, under Sec. 954 of the Revised Statutes of the United States.

This question is, however, supertechnical; was not raised by the defendant until after the trial of the case, and his rights were in no manner affected thereby, because he was protected by the accounting.

All the other contentions set forth in the brief of the appellant have been answered in our main brief.

Respectfully submitted,
PLATT & PLATT, MONTGOMERY & FALES.

IN THE

Uircuit Court of Appeals

For the Ninth Circuit

J. L. NIDAY AND MOLLIE GREEN NIDAY, GEORGE A. BUELL AND EFFIE ADA BUELL, AND A. L. GREEN, Appellants.

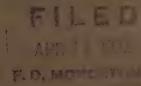
VS.

JULIA GREEN GRAEF.

Appellee and Cross Appellant.

PETITION FOR REHEARING

ALFRED A. FRASER,
Attorney for Appellants.





No.____

IN THE

Uirruit Court of Appeals

For the Ninth Circuit

J. L. NIDAY AND MOLLIE GREEN NIDAY, GEORGE A. BUELL AND EFFIE ADA BUELL, AND A. L. GREEN, Appellants.

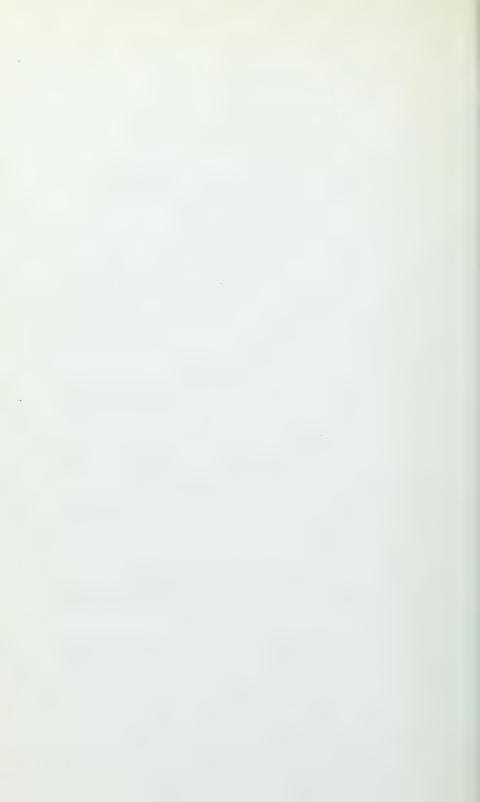
VS.

JULIA GREEN GRAEF,

Appellee and Cross Appellant.

PETITION FOR REHEARING

ALFRED A. FRASER,
Attorney for Appellants.



IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit

J. L. NIDAY AND MOLLIE GREEN NIDAY, GEORGE A. BUELL AND EFFIE ADA BUELL, AND A. L. GREEN, Appellants.

VS.

JULIA GREEN GRAEF,

Appellee and Cross Appellant.

PETITION FOR REHEARING

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit

Comes now the appellants, J. L. Niday and Mollie Green Niday and respectfully ask this Court to grant a rehearing in the above entitled suit for the following reasons:

That if the original opinion is permitted to stand it will establish a precedent for pleading in an equity suit in conflict with the decisions of the Supreme Court of the United States, of this Court and other Federal Courts.

The appellants contend that the Bill of Complaint



United States

Circuit Court of Appeals

For the Ninth Circuit

J. L. NIDAY AND MOLLIE GREEN NIDAY, GEORGE A. BUELL AND EFFIE ADA BUELL, AND A. L. GREEN, Appellants.

VS.

JULIA GREEN GRAEF,

Appellee and Cross Appellant.

PETITION FOR REHEARING

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit

Comes now the appellants, J. L. Niday and Mollie Green Niday and respectfully ask this Court to grant a rehearing in the above entitled suit for the following reasons:

That if the original opinion is permitted to stand it will establish a precedent for pleading in an equity suit in conflict with the decisions of the Supreme Court of the United States, of this Court and other Federal Courts.

The appellants contend that the Bill of Complaint

in the above entitled action is insufficient as a bill of equity and the action should have been dismissed. This question has not been directly passed upon by the opinion of the Court in this case and was, and is, the main question relied upon by the appellants in this suit.

The appellants contend, and did contend that a bill in equity for the rescission and cancellation of a deed is not sufficient where the plaintiff has permitted any lapse of time to occur after knowledge of the facts constituting the cause of action, unless the bill sets forth in detail the excuse for delay and any reason, if any, which prevented the plaintiff from prosecuting the action, and the bill also, must contain an offer to restore to the defendants all property or money received and offer to place the defendants in statu quo. We believe that it is essential that both these requisites are set forth in the bill.

The Bill of Complaint in this action contains no statement of any fact or facts excusing or giving any reason for the delay of the complainant in bringing the suit, nor is there contained therein one word in which the complainant tenders or offers to repay the defendants the amount of money expended by them in paying off the mortgages, taxes, and other liens upon the property, and no offer of any kind or character is contained in said bill offering to place the defendants in statu quo.

This Court in its opinion in this case upon the question of laches is as follows:

"We agree with the District Court that the appellant cannot successfully rely on the doctrine

of laches. It was not until April, 1918, that Mrs. Graef first learned of the existence of the deeds to Mr. Niday, and in January, 1919, litigation was commenced in the State Court of Idaho. Clearly, the defense of laches ought not to be sustained against her. The brother and sister who subsequently assigned their interests to Mrs. Graef, and who were originally co-plaintiffs with her, knew of the existence of the deeds within a short time after the death of Mr. Green; but the circumstances were not such as to make their delay unreasonable. As pointed out by the learned Judge of the District Court, the case is not one where one of the parties has permitted another to take all the chances of an enterprise and then after success has come demands a portion of the profits where he has been unwilling to share the risks. When the two original coplaintiffs who assigned to Mrs. Graef learned of the existence of the deeds Mr. Niday did not offer to put them on an equality with him. If he had done so and they had failed to avail themselves of the offer, the argument invoking the doctrine of laches would have force: but under the circumstances of the instant case it has not. (Southern Pacific Co. vs. Bogert, 250 U. S. 483.)

The above statement by the Court has reference to the facts as developed by the evidence. It makes no reference whatsoever to the question of pleading and we contend that whenever the facts are sufficient to excuse the complainant's laches, the facts upon which he relies for such an excuse must not only be developed by the evidence, but must be alleged in the pleading. If the complainant in this case had set forth in her Bill of Complaint the above facts as an excuse for the delay, then we would find no fault with the decision of this Court upon this question. But we again state that the facts excusing the delay must be alleged in the Bill of Complaint in order that the Court may say upon an examination of the pleading whether or not, as a question of law, the complainant has been guilty of laches. We have been unable to find any case in a Federal Court where a Bill of Complaint has been sustained where the complainant has been guilty of any delay in the commencement of the action after knowledge of the facts, unless such delay has been accounted for in the Bill of Complaint.

In one of the last cases decided by the Supreme Court of the United States; the case of Hays vs. Seattle, 251 U. S. 233 (citing on page 25 of our original brief), the Supreme Court says:

"It is for the complainant in his bill to excuse the delay in seeking equitable relief, where there has been such; and if it is not excused, his laches may be taken advantage of either by demurrer or upon final hearing. Maxwell vs. Kennedy, 8 How. 210, 222 L. Ed. 1051, 1055; Badger vs. Badger, 2 Wall. 87, 95, 17 L. Ed. 836, 838; Marsh vs. Whitmore, 21 Wall. 178, 185, 22 L. Ed. 482, 485; Sullivan vs. Portland & K. R. Co., 94 U. S. 806, 811, 24 L. Ed. 324, 326; Mercantile Nat. Bank vs. Carpenter, 101 U. S. 567, 25 L. Ed. 815; Landsdale vs. Smith, 106 U. S. 391,

27 L. Ed. 219, 1 Sup. Ct. Rep. 350; Hammond vs. Hopkins, 143, U. S. 224, 250, 36 L. Ed. 134, 145, 12 Sup. Ct. Rep. 418; Galliher vs. Cladwell, 145, U. S. 368, 371-373, 36 L. Ed. 738-720, 12 Sup. Ct. Rep. 873; Hardt vs. Heidwever, 152 U. S. 547, 559, 38 L. Ed. 548, 552, 14 Sup. Ct. Rep. 671; Abraham vs. Ordway, 158, U. S. 416, 420, 39 L. Ed. 1036, 1039, 15 Sup. Ct. Rep. 894; Willard vs. Wood, 164, U. S. 502, 524, 41 L. Ed. 531, 540, 17 Sup. Ct. Rep. 176; Penn. Mut. L. Ins. Co. vs. Austin, 168 U. S. 685, 696-698, 42 L. Ed. 626, 630, 631, 18 Sup. Ct. Rep. 223."

The rule is again stated in Wood vs. Carpenter (cited on page 27 of our original brief) in which the Court says:

"In this case the plaintiff is held to stringent rules of pleading and evidence. And especially must there be distinct averments as to the time when the fraud, mistake, concealment or misrepresentation was discovered, and what the discovery is, so that the Court may clearly see whether, by ordinary diligence, the discovery might not have been before made."

In the case of Ward vs. Sherman, 192 U. S. 168, a case in which there was an unexplained delay of three and one-half years, the Court says:

"It seems to us that the doctrine of laches applies with force and that upon the pleading the Court should have adjudged the defendant not entitled to either rescision of the contract or to hold the vendee as a mortgagee in possession."

The one case cited in the original opinion of this Court upon this question of laches, Southern Pacific Co. vs. Bogert, 250 U. S. 483. In regard to this case we desire to say, that from an examination of the opinion in this case had in the trial Court it would appear that the facts excusing the delay were pleaded in the Bill of Complaint and that the complainant in that case had immediately upon the discovery of the fraud commenced an action for relief and had continuously prosecuted actions for a recovery and relief, and in the opinion of the Supreme Court then say:

"But the essence of laches in not merely lapse of time. It is essential that there be also acquiescence in the alleged wrongs or lack of diligence in seeking a remedy. Here the plaintiffs, or others representing them protested as soon as the terms of the reorganization agreements were announced and ever since they have with rare pertinacity and undaunted by failure persisted in the diligent pursuit of a remedy as the schedule of the earlier litigation referred to in the margin demonstrates."

Again in the case at bar in the opinion of this Court it is stated.

"It was not until April, 1918, that Mrs. Graef first learned of the existence of the deeds to Mr. Niday and in January, 1919, litigation was commenced in the State Court of Idaho. Clearly the defense of laches ought not to be sustained as against her."

It is true that in the opinion of the trial Court the statement occurs that litigation was commenced in the State Court in January, 1919, however, the record is entirely silent as to when this litigation was commenced in the State Court and where the trial Court obtained this information the record does not disclose. However that may be, we know of no decision wherein any Court has held that the commencement and subsequent dismissal of an action would relieve a party from the charge of laches. In fact the decisions of the Court are to the contrary and it is held that the institution of a suit does not relieve a person from the charge of laches unless he proceeds with the diligent prosecution of that action.

In the case of Johnson vs. Standard Mining Co., 148 U. S. 360, 13 Sup. Ct. 585, the Court says:

"It was not until April, 1885, more than a year after the Fulton Mining Company had obtained a patent to the property that he made formal demand upon Chatfield and on August 1, 1885, filed his first bill in the Circuit Court of the United States to establish his title to a quarter interest in the lode. This suit does not seem to have been prosecuted with much diligence, since it was allowed to linger for nearly a year and was then dismissed, apparently from want of jurisdiction appearing upon the face of the bill.

"It has been frequently held that mere institution of suit does not of itself relieve a person from the charge of laches and that if he fail in the diligent prosecution of the action the consequences are the same as though no action had been begun."

Willard vs. Wood, 164, U. S. 502. Drees vs. Waldron, 212 Fed. 97.

It is shown by the record that the brother and sister who assigned their interests to the complainant knew of the execution and delivery of these deeds to the defendants, Niday, in the spring of 1917, immediately after the death of their father. The present suit was commenced March 23, 1920, a period of more than three years elapsed from the time they had knowledge of the transaction to the commencement of this suit and no reason or excuse is set forth in the bill for not more promptly commencing proceedings to set aside the transaction, a period of time sufficient to bar their right of action under the Statute of Limitations of this State. The records show that in the meantime the defendant Niday had paid out large sums of money in paying off mortgages, taxes, and other liens upon the property, that the property had doubled in value and had been sold to innocent purchasers by the efforts of the defendant. The Complainant now seeks to take the benefit of this advantageous sale without offering to do equity upon her part and the complainant herself as far as her individual interests in the property were concerned, conceding that she did not know of the transfer until 1918 (although the deeds were placed of record in 1916), delayed for a period of about two years and until after the sale of the property to innocent purchasers before she took any steps to question the validity of the transaction. Under these circumstances we contend that she has no standing in a Court of Equity to question these transfers.

The rule applicable to these cases is stated in the case of Stuart v. Hayden, by the Circuit Court of Appeals of the Eighth Circuit, 72 Fed. 402 as follows:

"If one who is induced to make a trade or sale by fraud would rescind it, he must immediately upon his discovery of the fraud, announce his intentions so to do, and return all the consideration he has received, to the end that the parties may be put in statu quo before subsequent transactions have made such action impossible. Silence, delay, vacillation, acquiescence, or the retention and use of any of the fruits of the sale or trade that are capable of restoration, for any considerable length of time after discovery of the fraud, constitute a complete and irrevocable ratification of the transactransaction. (The italics are ours.) Rugan vs. Sabin, 10 U. S. App. 519, 531, 3 C. C. A. 578, 580, 53 Fed. 415; Kinne vs. Webb, 12 U. S. App. 137, 144, 4 C. C. A. 170, 174, 54 Fed. 34, 38; Scheftel vs. Hays, 19 U. S. App. 220, 226 7 C. C. A. 308, 312, 58 Fed. 457, 460; McLean vs. Clapp, 141 U. S. 429, 12 Sup. Ct. 29; Grymes vs. Sanders, 93 U.S. 55, 62."

Again it is stated in the opinion of this Court as follows:

"When the two original co-plaintiffs who assigned to Mrs. Graef learned of the existence

of the deeds, Mr. Niday did not offer to put them on an equality with him. If he had done so and they had failed to avail themselves of the offer, the argument invoking the doctrine of laches would have force."

Counsel for the defendants contend that there was no evidence introduced to the effect that Mr. Niday did not offer to put the other heirs on an equality with him if they contributed in paying off the indebtedness against the property, but we contend that the record affirmatively shows that this very offer was made by Mr. Niday to the other heirs.

Plaintiff's Exhibit No. 3 is a copy of the letter written by Mr. and Mrs. Niday to the complainant in this action. This letter was placed in evidence by the complainant and it contains the following statement:

(Tr. page 150.)

"Now Jule when Father found he could not save his property he came to Mr. N—— and said he wanted him to take Greenhurst, if he thought he could save it, and you will remember that Niday asked Joe if he could contribute toward saving it, and take a proportionate interest, and stated to him that if we could hold on long enough real estate would come back, and you remember at that time farm as well as city property was but little in demand, in fact, no purchasers for it, but Joe said he simply could not; he did not have the money and it was either Niday or Dewey, as Dewey was going to foreclose. Niday also suggested

this to the rest of the children with the possible exception of Dr. Philo. The boys could not take it, so we raised the money at a time when Dewey was afraid he would have to take it and took a big chance, as we well knew it would have to be carried at a big loss each year we held it and that we could only hope to make up in an event of sale."

Plaintiff's Exhibit No. 4 is the copy of another letter admitted in the record to have been written and signed by the defendant Niday and received by the complainant in this action. This letter was also introduced in evidence by the complainant and contains the following statement:

(Tr. page 159.)

"I knew under the existing conditions that if Mr. Dewey started foreclosure proceedings that he would get the property, and I was in a position that I could handle it and he made me deed for it. This deed was dated October 1, 1915. I had before that time taken up with the different members of the family, Graef, Jim, Gracia, in fact, all of them, unless it were Phy, the advisability of all the family contributing to pay off this indebtedness, telling them that we would have to see that Mr. Green was supported during his lifetime and that it was too bad to let all of this property go, but none of them were in a position to aid in this purpose."

In the case at bar the complainant did not tender

either before suit or in the Bill of Complaint to pay back to the defendant the moneys he had expended in discharging the liens against the property and we insist that the bill is fatally deficient in this regard. From an exhaustive examination of the authorities upon this question we find that the Courts are divided as to whether or not it is necessary to make a tender and offer to place the defendant in statu quo before bringing the action or if it is sufficient to make such a tender and offer in the Bill of Complaint, but all Courts hold that it is necessary to pursue one or the other of these methods. The Bill of Complaint in this case contains no offer of this kind whatsoever and no evidence was introduced that any tender had been made prior to beginning the action.

This honorable Court has held that the complainant must make such tender in the complaint itself.

Alaska and Chicago Commercial Co. vs. Solner, 123 Fed. 855 (cited on page 34 of our original brief).

In the case of Bregogle vs. Walsh (7 C. C. A.), 80 Fed. on page 177 (cited on page 37 of our original brief), the Court of appeals says:

"To be entitled to a cancellation or rescission of the agreements it was therefore necessary that the appellants, before bringing the suit, should themselves have offered to cancel the agreements, should have returned or offered to return to the trust company the Brefogle notes which had been surrendered, and have repaid or offered to repay to that company, with interest, whatever sums it has paid to Voris or otherwise

had expended. They could not treat such sums as an addition to their debt to the trust company, and so retain a benefit from the agreements which they sought to have rescinded."

See other cases cited in our original brief.

We earnestly insist that the complainant in this case and the other heirs of the said R. E. Green, deceased, are not in a position to claim that they were ignorant of the facts regarding the transfer of the land in controversy to the defendant until more than a year after the death of said R. E. Green, for the reason that all knew that the said R. E. Green was the owner of the home place known as Greenhurst, and that upon his death any inquiry upon their part would have disclosed to them the fact of such transfer. They had the means or knowledge at hand and if they failed to avail themselves of the knowledge which they had and which they could obtain, they were guilty of negligence in not so doing. The facts in this case are very similar to the facts in the case of Pickens vs. Merriam, decided by this Court and reported in the 274 Fed., page 1, and on page 17 this Court says:

"The record of the deeds was open to inspection, and the fact was there apparent touching the date of the deeds and the date of their recording. This of itself was sufficient to induce inquiry why the deeds were not recorded until the day after the death of Mrs. Fensky. The two principal witnesses to the execution of the deeds,

Parmele and Ferguson, were accessible. Had complainants gone to them, they would have readily obtained the truth in the premises. Instead of prompt action being taken, the estate of Mrs. Fensky was allowed to be closed and the balance of the property on hand to be distributed. In the meantime the grantees in the deeds have, in some instances, sold the lands deeded to them, in others they had paid off mortgages in considerable sums which were upon the property when it came to them, and in most instances they have made improvements and kept up repairs, and have paid the taxes incident thereto."

For other cases covering the points mentioned in this petition for rehearing we respectfully refer the Court to the original brief of appellants filed herein and desire to say that counsel for the appellee in his brief has cited no cases covering the objections which we have made to the pleading in this case and cite this Court to no case or cases in conflict with, or in any manner modify the rules of law which we maintain should govern the Court in this action.

Asking the careful attention of this Honorable Court to the matters set forth in this petition, the same is respectfully submitted.

> A. A. FRASER, Attorney for Appellants.

No. 37134

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

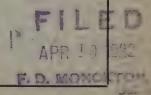
J. L. NIDAY and MOLLIE GREEN NIDAY, GEORGE A. BUELL and EFFIE ADA BUELL and A. L. GREEN, Appellants,

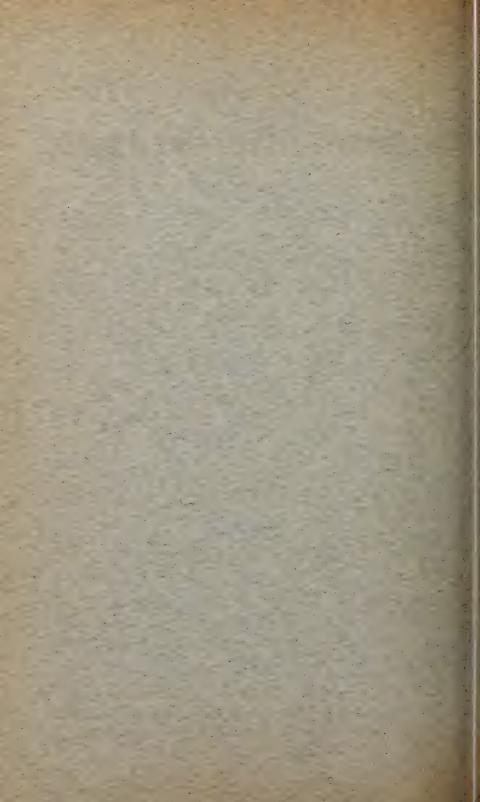
VS.

JULIA GREEN GRAEF,
Appellee and Cross Appellant.

PETITION

PLATT & PLATT, MONTGOMERY & FALES, Solicitors for Appellee





IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

J. L. NIDAY and MOLLIE GREEN NIDAY, GEORGE A. BUELL and EFFIE ADA BUELL and A. L. GREEN, Appellants,

VS.

JULIA GREEN GRAEF,
Appellee and Cross Appellant.

PETITION

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The appellee and cross appellant respectfully directs the attention of the Court to the subject of an allowance to the cross appellant for attorney's fees.

This Court in its opinion stated that no authority had been cited for the allowance of other than statutory costs or for allowing attorneys fees.

Since the rendition of the decision in this case, we have found a decision of the Supreme Court of the United States which, in our opinion, supports the cross appellant's claim for attorneys fees.

The allowance of costs and attorneys fees in a federal equity court is a matter within the sound discretion of the court and is not governed by statute.

"Costs in admiralty, as well as in equity, are in the discretion of the court."

The Scotland, 118 U.S. 519.

Dodge vs. Tulleys, 144 U.S. 451.

Vol. IV, page 806, note 16, Enc. of U. S. Supreme Court Reports.

This principle was specifically applied by the Supreme Court of the United States in the case of Harrison vs. Perea, 168 U. S. 311, 325.

This was a suit instituted by one of the heirs at law of Jose L. Perea against a gentleman by the name of Harrison, individually and as administrator of the estate of his wife, and against the other heirs of the said Jose L. Perea.

The suit was brought to compel an accounting by the said Harrison, individually and as administrator, for the property of Jose L. Perea which had come into his hands. The bill of complaint alleged misconduct on the part of the said Harrison in procuring and maintaining possession of such estate.

One of the objections raised in the Supreme Court of the United States related to the allowance of a solicitor's fee.

Upon this question the Court decided as follows:

"The defendant also objects to the allowance of the solicitor's fee which is charged against the fund. We think no error arises from this action of the Court below. By the exertions of the solicitor the fund was recovered and it was properly made to bear some portion of the expense of its administration. The amount was within the judicial discretion of the Court and in fixing that amount the Court could proceed upon its own knowledge of the value of the solicitor's services. Internal Improvement Fund, Trustee, vs. Greenough, 105 U. S. 527; Fowler vs. Equitable Trust Company, 141 U. S. 411, 415."

Harrison vs. Perea, 168 U.S. 311, 325.

We respectfully urge that the above case is directly in point in that it was a suit like the one at bar, by an heir at law to procure a fund improperly taken.

This Court in its decision has determined that Mr. Niday improperly obtained some deeds from Mr. R. E. Green and thereby became a trustee de son tort.

By his own wrong he made himself a trustee and compelled the plaintiff to litigate in order to procure her interest.

Under such circumstances, we respectfully urge that the plaintiff should be allowed her special costs and a reasonable attorney's fee.

As already shown, such allowance is within the discretion of a court of equity and is not governed by statute.

The Court's suggestion that we had cited no authority in support of this position was very properly made, and for that reason we have presented the above authority in this petition.

In connection with this petition we direct the Court's attention to the language at the bottom of page 6 and top of page 7 of its opinion, and ask for an instruction in this particular to the lower court in the mandate which is sent down.

This Court suggests that Mr. Niday must account for any profit made out of the sale, which we understand to be a well established principle of law.

This Court also suggests that Niday had a right to buy the interest of the heirs who sold to him, and that it was not necessary to account to Mrs. Graef for such purchase, but that he should account for any profit made out of the sale to the purchasers.

We interpret this language to mean that Mr. Niday could purchase the interests of the cestuis que trustent which he did purchase and that the

plaintiff could not question the purchase, but that Mr. Niday must account for the profits arising from the sale of the property acquired by such purchase.

This is in direct accord with the language of the Supreme Court of the United States in the case of Michoud vs. Girod, which reads as follows:

"We scarcely need add, that a purchase by a trustee of his cestui que trust, sui juris, provided it is deliberately agreed or understood between them that the relation shall be considered as dissolved, and there is a clear contract, ascertained to be such, after a jealous and scrupulous examination of all the circumstances, * * * * and no advantage taken by the trustee of information acquired by him as trustee, will be sustained in a court of equity. * * * * And therefore, if a trustee, though strictly honest, should buy for himself an estate from his cestui que trust, and then should sell it for more, according to the rules of a court of equity, from general policy, and not from any peculiar imputation of fraud, he would be held still to remain a trustee to all intents and purposes, and not be permitted to sell to or for himself."

Michoud vs. Girod, 4 Howard, 504, 556.

Also, the Supreme Court of West Virginia in affirming the above rule and holding that a re-sale of property purchased by a trustee from his cestui que trust necessitated an accounting to the cestui que trust of any profit made, concluded as follows:

"* * * if there are several persons occupying the position of cestui que trust, one may have the sale invalidated, though the others are content."

Newcomb vs. Brooks, 16 W. Va. 70, 71.

We understand that the language of this court appearing on the bottom of page 6 of its opinion was used by the court in accord with the rule laid down in the case of Michoud vs. Girod, above cited.

In the case at bar the following situation has developed:

Mr. Niday sold the res of which he was trustee for the cross-appellant.

He converted this res into a mortgage, given by the purchasers of the property.

In connection with the sale Mr. Niday purchased the interests of two heirs.

The acceptance of the sale by the cestui que trusts validated the purchase made by Mr. Niday, in order to confirm the title in the innocent purchasers.

Under the new order of accounting, the actual value of the mortgage which represents the res will be about Twenty-four Thousand Dollars (\$24,000.)

One-half of this mortgage is to be awarded to the cross-appellant as her interest in the res.

One-third of the other half goes to Mrs. Niday as an heir of Mr. Green.

The other two-thirds goes to Mr. Niday by virtue of his purchase from the two heirs.

In the interest which Mr. Niday thus acquires, however, there is a considerable element of profit.

The evidence will undoubtedly show that Mr. Niday purchased these two interests for about Three Thousand Dollars (\$3,000.00.)

The value of these two interests is Eight Thousand Dollars (\$8,000.00).

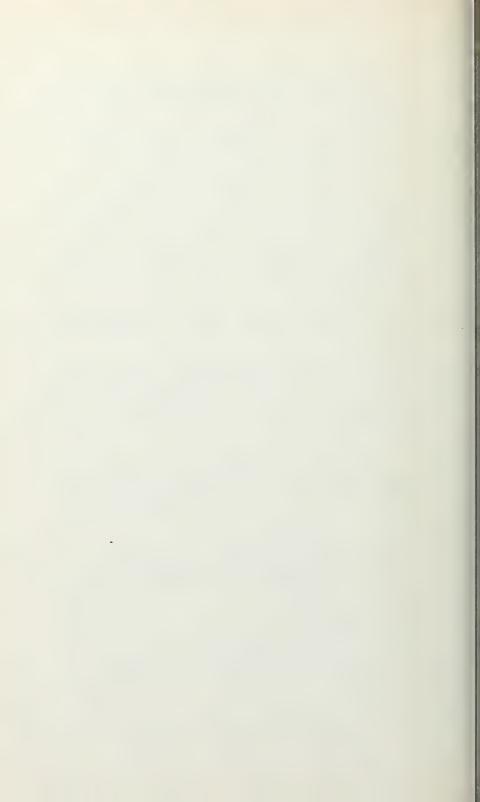
Under such circumstances Mr. Niday should account to the cestui que trusts for the profit which he holds, and those cestui que trusts are Mrs. Graef and Mrs. Niday.

We therefore respectfully request that an instruction be inserted in the mandate giving specific directions as to the distribution of these profits.

Very Respectfully Submitted,

PLATT & PLATT, MONTGOMERY & FALES, Solicitors for Appellee and Cross Appellant.

HUGH MONTGOMERY, of Counsel.



IN THE

United States Circuit Court of Appeals For the Ninth Circuit

JOHN SWENDIG, JAMES W. MILLER, REMIGUS GRAB, ANTHONY KERR, Appellants,

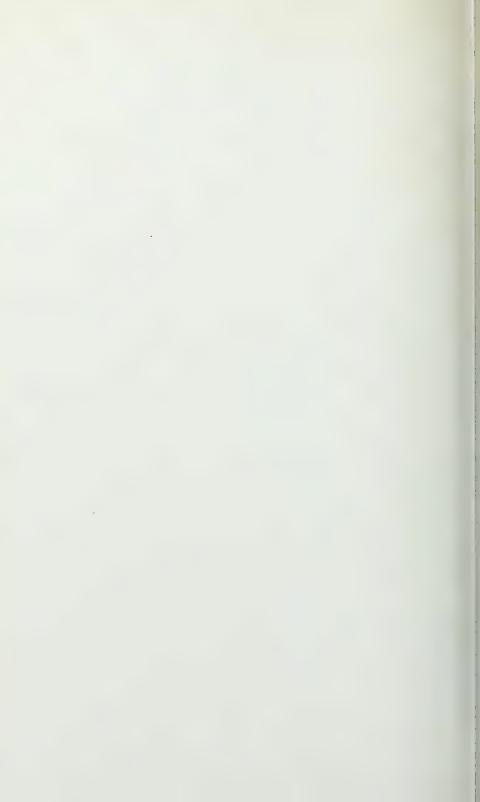
VS.

THE WASHINGTON WATER POWER COMPANY, a Corporation,

Appellee.

Transcript of the Record

Upon Appeal from the United States District Court for the District of Idaho, Northern Division.



IN THE

United States Circuit Court of Appeals For the Ninth Circuit

JOHN SWENDIG, JAMES W. MILLER, REMIGUS GRAB, ANTHONY KERR, Appellants,

VS.

THE WASHINGTON WATER POWER COMPANY, a Corporation,

Appellee.

Transcript of the Record

Upon Appeal from the United States District Court for the District of Idaho, Northern Division.

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

J. F. AILSHIE, RAY AGEE, Coeur d'Alene, Idaho. Attorneys for Appellants.

JOHN P. GRAY, Coeur d'Alene, Idaho. Attorney for Appellee.

INDEX.

Answer of John Swendig	. 27
Assignment of Errors	. 82
Bond on Appeal	85
Complaint	9
Citation	88
Clerk's Certificate	10 0
Decree	75
Defendant's Exhibit No. 1	91
Defendant's Exhibit No. 2	93
Defendant's Exhibit No. 3	95
Defendant's Exhibit No. 4	98
Defendant's Exhibit No. 5	110
Motion to Dismiss	50
Memorandum Decision upon Motion to Dismiss.	52
Order Allowing Appeal	82
Paragraph Ten of Complaint Against James W.	
Miller	24
Paragraph Ten of Complaint Against Remigius	
Grab	25
Paragraph Ten of Complaint Against Tony	
Kerr	26
Petition for Appeal	81
Plaintiff's Exhibit No. 14	101
Praecipe	89
Return to Record	90
Statement of Case	54



INDEX TO STATEMENT OF CASE.

Witnesses on Part of Plaintiff:

Direct	67
CRANE, E. S.— Direct	6 8
FISKEN, JOHN B.— Direct	
HOOPER, LEROY— Direct Cross Re-direct Re-cross Re-direct	
LANGLEY, FRANK— Direct Cross	54 57
LOGAN, EUGENE— Direct Cross Re-direct	59 60 61

WITNESSES ON PART OF DEFENDANTS.

GRAB, REMIGIUS— Direct Cross Re-direct Re-cross	72 72
KERR, ANTHONY—	
Direct	73
Cross	
MILLER, J. W.—	
Direct	69
Cross	7 0
SWENDIG, JOHN—	
Direct	70
Cross	

In the District Court of the United States, for the District of Idaho, Northern Division.

THE WASHINGTON WATER POWER COMPANY, a Corporation,

Plaintiff.

VS.

JOHN SWENDIG, JAMES W. MILLER, REMIGUS GRAB, ANTHONY KERR, Defendants,

CONSOLIDATED CAUSES. No. 752, 753, 754 and 755.

COMPLAINT

Against John Swendig.

The Washington Water Power Company, a corporation organized under the laws of the State of Washington, as plaintiff brings this bill of complaint against John Swendig, and for cause of action alleges:

I.

The plaintiff is now and was at all of the times mentioned in the complaint, a corporation created and existing under and by virtue of the laws of the State of Washington, having its principal place of business at Spokane, Washington, and now is, and was at all of the times mentioned in this complaint, a citizen of the State of Washington, and has at all of the times hereinafter mentioned fully complied with the laws of the State of Idaho relating to foreign corporations, and is now, and was at all of the times herein mentioned, authorized and empowered by virtue of such compliance with the laws of the State of Idaho to do business and to acquire and hold property in said state, and that under and by virtue of its articles of incorporation it is and at all of the times herein mentioned has been empowered to construct, acquire, own and operate electric power transmission lines and telephone lines in the State of Idaho.

That the defendant is a resident and citizen of the State of Idaho.

II.

That the jurisdiction of the United States District Court for the District of Idaho over this suit is invoked and depends upon the following grounds, to-wit:

(1) Upon the ground that the construction and application of the Act of February 15th, 1901, Chapter 372, (31 Statutes at Large, 790) entitled "An Act Relating to rights of way through certain parks, reservations, and other public lands"; and also the Act of March 3, 1901, (31 Statutes at Large, 1083) is involved; and also the Act of June 21, 1906 (34 Statutes at Large, 335) is involved;

and that the amount in controversy exceeds in value the sum of \$3000, exclusive of interest and costs, all of which will appear from the facts hereinafter set forth. That the suit involves a claim to real property in the District of Idaho.

(2) On the ground that the plaintiff is a citizen and resident of the State of Washington and that the defendant is a citizen and resident of the State of Idaho, as appears by the first paragraph of this bill of complaint, and that the suit involves a claim of title to real property in the Northern Division of the District of Idaho, and the amount in controversy in this suit exceeds in value, exclusive of interest and costs, the sum of \$3000.

III.

That the land described as Section 26, Township 47, N. R. 3, W. B. M., was formerly a part of the Coeur d'Alene Indian Reservation.

That prior to April 15, 1902, this plaintiff filed an application with the Department of the Interior of the United States of America for authority to construct a telephone line through and across the Coeur d'Alene Indian Reservation in the State of Idaho, which said right of way so applied for crossed, among other lands within said reservation, the land described as the Northeast quarter of Section 26, Township 47, N. R. 3 W. B. M., the said application being made in pursuance of Section 3 of the Act of Congress approved March 3, 1901, entitled "An Act making appropriation for

the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, nineteen hundred and two, and for other purposes."

That at that time the said lands were a part of the Coeur d'Alene Indian Reservation and were unsurveyed and not open to settlement.

The right, authority and permission to survey and locate and maintain a telephone line through and across the said Coeur d'Alene Indian Reservation and across the said Northeast quarter of Section 26, Township 47 N. R. 3, W. B. M., was on the 15th day of April, 1902, granted by the Honorable Secretary of the Interior upon condition that the company pay such damages and compensation by reason of the location and construction of said line as were thereafter assessed under the direction of said Secretary of the Interior, which said compensation was thereafter assessed and fixed by the said Secretary of the Interior at the sum of \$224, which said sum was by this plaintiff paid into the office of Indian Affairs under the said act of congress above referred to.

That the said right of way and easement granted by the said Secretary of the Interior, as aforesaid, was over and across, together with other lands, the said Northeast quarter of Section 26, Township 47 N. R. 3 W. B. M.

That the said grant and easement above mentioned has ever since been and now is a valid and subsisting grant and easement and in full force and effect.

IV.

That prior to July 7, 1902, this plaintiff filed an application with the Department of the Interior of the United States of America for a permit for a right of way across, and permission to construct and maintain an electric power transmission line over and across the Coeur d'Alene Indian Reservation. That said application was made in pursuance of the provisions of the Act of February 15, 1901, (31 Statutes at Large, 790). That the right, authority and permission applied for was given by the Honorable Secretary of the Interior under date of July 7, 1902, and the use of the right of way was permitted in accordance with the provisions of said act of congress and the regulations thereunder.

That at that time the said lands over which the said right of way was sought were a part of the Coeur d'Alene Indian Reservation and were unsurveyed and not open to settlement.

That the said permit so given to this plaintiff by the Secretary of the Interior on the said 7th day of July, 1902, was over and across, together with other lands, the said Northeast quarter of Section 26, Township 47 N. R. 3 W. B. M. That the said permit above mentioned has ever since been and now is a valid and subsisting permit in full force and effect, and was issued long prior to any rights initiated by the defendant and long prior to the time when said lands were open to occupancy and settlement.

V.

That pursuant to the said permit, the plaintiff did construct over and across the said Coeur d'Alene Indian Reservation a high tension electric power transmission line extending from Spokane, Washington, to Burke, Idaho, and ever since on or about the 24th day of August, 1903, has been using the same for the purpose of supplying electric power and energy in the mining district of Shoshone County, Idaho, and that the said electric power transmission line is of great value, towit, of more than the value of \$25,000, and that the right to maintain the same and to exercise the rights of the plaintiff under the said permit is of the value of more than \$25,000, exclusive of interest and costs, and the value of the use of said line and of said right of way is of the value of more than \$25,000, exclusive of interest and costs.

VI.

That the said plaintiff, under its easement and right to construct a telephone line, did also construct over and across said right of way and upon the same poles as the electric power transmission line was constructed, a telephone line and

has continued to operate and maintain the same and use the same ever since on or about the 24th day of August, 1903. That the said telephone line is of great value, to-wit, of the value of more than the sum of \$5000, and the right to maintain the same and to exercise the rights of the plaintiff under the said permit is of the value of more than \$5000, exclusive of interest and costs, and the value of the use of said line and of said right of way is of the value of more than \$5000, exclusive of interest and costs.

VII.

That is it necessary for the plaintiff to patrol the said line and every part thereof, including that portion of the line which extends across the said Northeast quarter of Section 26, Township 47 N. R. 3 W. B. M., and in order to do so the plaintiff, did, under its permit and as a necessary part of the construction and maintenance of said line, construct along the said power transmission line a patrol road, which said patrol road this plaintiff constructed during the years 1902 and 1903, and ever since has used the same, except as the use thereof has been interferred with by the acts of the defendant, as hereinafter set forth.

That the said patrol road is necessary in order for the patrolmen to pass along the said power transmission line for the purpose of watching the same, keeping the same in working condition and in the event of accident or injury thereto for the purpose of repairing or renewing the same, and is covered by the said easement and also by the said permit.

VIII.

That the said power transmission line, telephone line and patrol road have not been changed whereby they would differently affect the said Northeast quarter of Section 26, Township 47 N. R. 3, W. B. M., since the year 1903.

IX.

That by virtue of said facts, this plaintiff became vested by virtue of its said permit with the right to maintain and operate its said electric power transmission line as provided in the said permit, and that by virtue of such facts, the defendant, took whatever right, title or interest was vested in him by the Government of the United States by virtue of said permit to said land subject to the permit granted by the government of the United States to this plaintiff and the permit to use the said lands in connection with its said power transmission line and the rights of the defendant are subsequent to and subject to the rights of this plaintiff under and by virtue of said permit above described, which has never been revoked and remains in full force and effect.

That also by virtue of said facts, this plaintiff became vested by virtue of its said easement to use said land in connection with its telephone line, as provided in said easement, and that by virtue of such fact the defendant took whatever right, title or interest was vested in him by the Government of the United States by virtue of said patent to said land, subsequent and subject to the easement granted by the Government of the United States to this plaintiff and the easement to use said land in connection with its said telephone line, and the rights of the defendant are subsequent to and subject to the right of this plaintiff under and by virtue of said easement above described, which has never been revoked and which remains in full force and effect.

X.

That at the time of the issuance of said permit to this plaintiff and also at the time of the issuance of said easement to this plaintiff and at the time of the construction of said electric power transmission line, of said telephone line and of said patrol road along the same, the defendant had no right, title or interest in or to said land or any part thereof.

That by the act of June 21, 1906 (34 Statutes at Large, 335), provision was made for the allotment to the members of the Coeur d'Alene tribe of Indians of lands within the Indian reservation, and the subsequent opening of the said reservation to settlement by citizens of the United States.

That on or about the 2nd day of May, 1910, the defendant made a homestead filing upon the land described as the Northeast quarter of Section 26,

Township 47 N., R. 3 W. B. M., and thereafter made final proof on or about the 3rd day of May, 1913, and thereafter patent of the United States was issued therefor on or about the 30th day of October, 1913, and the defendant holds under said title.

XI.

That at the time said lands were settled upon by the defendants as also at the time the said lands were selected and filed upon by the said defendant, and at all times since, the said permit and said easement of this plaintiff, and each thereof were in full force and effect, and said power line, telephone line and patrol road had been constructed over and across said lands, and at all of said times were used by the said plaintiff and any rights acquired by the said defendant were subsequent to and inferior to the plaintiff's easement, and subject to and inferior to plaintiff's said permit.

That at and before the defendant settled upon or filed upon said lands or initiated any rights thereto, the said power transmission line, telephone line and patrol road were constructed over and across said lands and the plaintiff was maintaining and operating its said lines and the said defendant at the time of acquiring any right had full notice and knowledge of said plaintiff's said easement and that the plaintiff was operating the said telephone line thereunder, and also had full notice and knowledge of the plaintiff's said per-

mit and that the plaintiff was maintaining and operating its said electric power transmission line, and for the purpose of caring for the same and patrolling the same, renewing and repairing the same, had constructed and was using the said patrol road, and that the said telephone line, electric power transmission line and patrol road crossed, among other lands, the said lands described as the Northeast quarter of Section 26, Township 47 N., R. 3 W. B. M.

That the said defendant acquired any rights by virtue of his settlement and filing upon said lands with full knowledge of all such facts and the patent issued by the Government of the United States therefor was subject to the rights of this plaintiff both under said permit and said easement.

XII.

That the said permit so granted unto this plaintiff for the maintenance of said electric power transmission line as also the easement and rights to this plaintiff for a right of way for said telephone line granted under the said two acts of congress, heretofore referred to, were prior to any right acquired by the defendant, and the settlement and initiation of the rights of the defendant on said lands was subsequent to the plaintiff acquiring the said rights by virtue of the said permit and by virtue of said easement, and the subsequent patent of said lands to the said defendant by the United States Government under and by virtue of the Act of June 21, 1906, did not affect, revoke or annul

either the said permit or the said easement, and the plaintiff has at all times since the granting thereof had the right to operate and maintain the same, and has had the right to patrol the same and to maintain for that purpose the said patrol road along the same. That the said patrol road is a necessary incident to the maintenance of said power transmission line.

XIII.

That the said defendant, since acquiring his interest in said lands, has extended a fence across said rights of way on the east of the section line of said Section 26, and another fence approximately along the north and south quarter line of said Section 26, Township 47 N., R. 3 W. B. M., and has so constructed the said fences and wired the same up as to prevent this plaintiff and its employes from driving along the same or passing along the same with any vehicle or horse, and has closed up said patrol road and declines and refuses to permit this plaintiff to patrol the same and has notified the employes of this plaintiff that they should not go upon the said land to repair the said lines or the poles or to otherwise maintain the same, and gives out and threatens that he will prevent the plaintiff or its employes from going along the same or repairing the said transmission line and telephone, all of which is in violation of the rights of this plaintiff granted as aforesaid; and has ordered this plaintiff and its

employes in the future not to go upon said lands for the purpose of repairing said lines.

XIV.

That the said homestead entry and settlement of the defendant and the said patent of the United States issued pursuant thereto were all subject to the rights of this plaintiff and the issuance of said patent by the Government of the United States did not modify, annul, revoke or cancel either the said permit or the said easement.

That the said defendant has prevented the employes of this plaintiff from driving along said right of way and patrolling the same in a proper manner, and threatens to continue said conduct in the future, and has warned the employes of this plaintiff not to go upon said land to repair the said power transmission line and telephone line or either thereof, or the poles upon which the same are strung, and threatens to continue such conduct in the future, all of which will seriously impede and interfere with the performance of its duties as a public service corporation by the plaintiff and prevent it from enjoying its rights under the said permit and under said easement.

That this plaintiff is engaged in furnishing power for the use of the mines of the Coeur d'Alene mining district and for the use of the inhabitants of that district for light and power, and furnishing light for municipal use, and the acts of the de-

fendant do interfere with and will interfere with the discharge of those duties.

WHEREFORE, plaintiff prays:

- (1.) That this court may issue its injunction perpetually enjoining and restraining the said defendant and all persons acting under his authority or pretending so to act, and all successors in interest of said defendant, from interferring with this plaintiff in operating and maintaining the said electric power transmission line and the said telephone line and the said patrol road over and across the Northeast quarter of Section 26, Township 47 N., R. 3. W. B. M., and from passing along and over the said patrol road;
- (2.) That the said defendant, his agents, servants and employes, be restrained during the pendency of this action from interferring with this plaintiff in operating and maintaining the said electric power transmission line and the said telephone line and the said patrol road over and across the Northeast quarter of Section 26, Township 47 N., R. 3. W. B. M., and from passing along and over said patrol road;
- (3.) That this court shall decree that the said permit and the said easement and each thereof are in full force and effect and that the said patent of the United States did not annul, revoke or modify or affect the rights of this plaintiff thereunder.

(4.) Plaintiff also prays for its costs and for general equitable relief.

JOHN P. GRAY, W. F. M'NAUGHTON, Attorneys for Plaintiff.

Residence and P. O. Address, Coeur d'Alene, Idaho.

STATE OF IDAHO)

) SS

County of Spokane.)

V. G. SHINKLE, being first duly sworn, on his oath deposes and says:

That he is the Treasurer of The Washington Water Power Company, the plaintiff in the above entitled action and makes this verification for and on behalf of said plaintiff, and is duly authorized so to do; that he has read the foregoing complaint, knows the contents thereof and that he believes the facts therein stated to be true.

V. G. SHINKLE.

Subscribed and sworn to before me this 14th day of May, 1920.

S. C. SCOTT,

Notary Public for Washington. Residing at Spokane, Washington.

(Notary Seal)

Endorsed: Filed May 18, 1920.

W. D. McREYNOLDS, Clerk.

By L. M. Larson, Deputy.

(Title of Court and Cause.)

COMPLAINT AGAINST JAMES W. MILLER X.

That at the time of the issuance of said permit to this plaintiff and also at the time of the issuance of said easement to this plaintiff and at the time of the construction of said electric transmission line, of said telephone line and of said patrol road along the same, the said defendant had no right, title or interest in or to said land or any part thereof.

That by the act of June 21, 1906 (34 Statutes at Large, 335) provision was made for the allotment to the members of the Coeur d'Alene tribe of Indians of lands within the Indian reservation, and the subsequent opening of the said reservation to settlement by citizens of the United States.

That on or about the 4th day of May, 1910, the defendant made a homestead filing upon the land described as the North half of the Southwest quarter and the East half of the Northwest quarter of Section 26, Township 47 N., R. 3. W. B. M., and thereafter made final proof on or about the 3rd of June, 1913, and thereafter patent of the United States was issued therefor on or about the 23rd day of January, 1913, and defendant holds under said title.

Endorsed: Filed May 18, 1920.

W. D. McREYNOLDS, Clerk.

By L. M. Larson, Deputy.

(Title of Court and Cause.)

COMPLAINT AGAINST REMIGUS GRAB X.

That at the time of the issuance of said permit to this plaintiff and also at the time of the issuance of said easement to this plaintiff and at the time of the construction of said electric power transmission line, of said telephone line and of said patrol road along the same, the said defendant had no right, title or interest in or to said land or any part thereof.

That by the act of June 21, 1906 (34 Statutes at Large, 335), provision was made for the allotment to the members of the Coeur d'Alene tribe of Indians of lands within the Indian reservation, and the subsequent opening of the said reservation to settlement by citizens of the United States.

That on or about the 7th day of May, 1910, the defendant made a homestead filing upon the land described as the Northeast quarter of Section 24, Township 47 N., R. 3 W. B. M., and thereafter made final proof on or about June 24, 1912, and thereafter patent of the United States was issued therefor on or about the 24th day of September, 1912, and the defendants holds under said title.

Endorsed: Filed May 18, 1920.

W. D. McREYNOLDS, Clerk.

By L. M. Larson, Deputy.

(Title of Court and Cause)

COMPLAINT AGAINST TONY KERR

X.

That at the time of the issuance of said permit to this plaintiff and also at the time of the issuance of said easement to this plaintiff and at the time of the construction of said electric power transmission line of said telephone line and of said patrol road along the same, the said defendant had no right, title or interest in or to said land or any part thereof.

That by the act of June 21, 1906 (34 Statutes at Large, 335), provision was made for the allotment to the members of the Coeur d'Alene tribe of Indians of lands within the Indian reservation, and the subsequent opening of the said reservation to settlement by citizens of the United States.

That on or about the 22nd day of December, 1910, the defendant made a homestead filing upon the land described as Lot 2, and the Southeast quarter of the Northwest quarter and the Southwest quarter of the Northeast quarter and the Northwest quarter of the Southeast quarter of Section 19, Township 47 N., R. 2 W. B. M., and thereafter made final proof September 28, 1917, and thereafter patent of the United States was issued therefor on or about the 15th day of October, 1918, and

the defendants hold under said title.

Endorsed: Filed May 18, 1920.

W. D. McREYNOLDS, Clerk.

By L. M. Larson, Deputy.

(Title of Court and Cause)

ANSWER OF JOHN SWENDIG

Comes now the defendant and for answer to plaintiff's alleged cause of action, admits, denies and alleges as follows:

I.

Admits all of paragraph I of plaintiff's complaint.

II.

Answering paragraph III of plaintiff's complaint, defendant admits that the land described as Section 26, Township 47, N. R. 3 W. B. M., was formerly a part of the Coeur d'Alene Indian Reservation.

As to whether or not, "Prior to April 15, 1902, plaintiff filed an application with the Department of the Interior of the United States of America for authority to construct a telephone line through and across the Coeur d'Alene Indian Reservation in the State of Idaho, which right of way so applied for crossed, among other lands within said reservation, the land described as the Northeast quarter of Section 26, Township 47, N. R. 3. W. B. M., the said application being made in pursuance of Section 3 of

the Act of Congress approved March 3, 1901, entitled, 'An act making appropriation for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian Tribes for the fiscal year ending June 30, 1902, and for other purposes," defendant has no information or knowledge sufficient to enable him to answer, therefore he denies each and every allegation thereof, and each and every allegation in said paragraph contained, and denies that prior to April 15, 1902, or prior to any other date, or on any other date, plaintiff filed an application with the Department of the Interior of the United States, or with any other department of the United States, for authority to construct a telephone line through and across, or through or across the Coeur d'Alene Indian Reservation in the State of Idaho, and denies that said right of way so applied for, if applied for, crossed among other land within said reservation, the land described as the Northeast quarter of Section 26, Township 47 N., R. 3 W. B. M., and denies that said application, or any other application, "was made in pursuance of Section 3 of the Act of Congress approved March 3, 1901, entitled, 'An act making appropriation for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian Tribes for the fiscal year ending June 30, 1902, and for other purposes," "or that said application or any other application for said

permit, or any application for any permit to construct a telephone line across the Coeur d'Alene Indian Reservation, which permit was also over and across said land, was ever filed, by or in behalf of plaintiff, with the Department of the Interior of the United States, or with any other department of the United States, pursuant to said above-mentioned act, or pursuant to any other act or acts of Congress whatsoever.

Denies that the right, authority and permission, or the right, authority, or permission, or any other right, authority or permission, to survey, locate and maintain, or to survey, locate or maintain a telephone line through and across, or through or across the Coeur d'Alene Indian Reservation, or across said Northeast quarter of Section 26, Township 47 N., R. 3 W. B. M.; was, on the 15th day of April, 1902, or on any other day, or date, granted to plaintiff or any person in its behalf by the Honorable Secretary of the Interior, or by any other person having lawful authority to grant such right, authority or permission, upon condition that plaintiff pay such damages and compensation by reason of the location and construction of said line as were thereafter assessed under the direction of said Secretary of the Interior, or upon any other condition or conditions, or at all; denies that said compensation, or any other compensation, was thereafter assessed and fixed, or assessed or fixed, by said Secretary of Interior, or by any other person having lawful authority to so assess or fix such compensation, at the sum of Two Hundred Twenty-four (\$224.00) Dollars, or was assessed and fixed, or assessed or fixed, by said Secretary of the Interior, or any other person having lawful authority to so assess or fix such compensation, at any other sum or sums whatever, or at all; and denies that plaintiff, or any person in its behalf, paid into the office of Indian Affairs, or into any other office of the United States, under said Act of Congress, above referred to, or under any other act or acts of Congress, or at all, the sum of Two Hundred Twentyfour (\$224.00) Dollars, or any other sum or sums whatever for any permit, right or authority, to survey, locate and maintain, or to survey, or locate, or maintain, a telephone line through and across, or through or across the Coeur d'Alene Indian Reservation, which permit, right or authority crossed the above-described land.

Denies that the said right of way and easement, or said right of way or easement, or any other right of way or easement, granted by the Secretary of Interior, or by any other person having lawful authority to grant such rights of way or easements, was over and across, or over or across, together with other lands the said Northeast quarter of Section 26, Township 47 N., R. 3 W. B. M., and further denies that any right of way or easement, whatsoever, has ever been granted by the Secretary of Interior, or any other person having lawful au-

thority to grant the same, to plaintiff, or any person in its behalf, or to any other person, to go upon said land or any part thereof for the purpose of constructing, locating, or maintaining any telephone line or lines whatsoever.

Denies that said grant and easement, or said grant or easement above-mentioned, or any other grant and easement, or any other grant or easement has ever since been and now is, or has ever been, or not is, a valid and subsisting grant and easement in full force and effect, or a valid or subsisting grant and easement in full force and effect, or a valid and subsisting grant or easement in full force and effect, or a valid or subsisting grant or easement in full force and effect, or a valid or subsisting grant or easement in full force or effect.

III.

Answering paragraph IV of plaintiff's complaint, defendant says that as to whether or not, "Prior to July 7, 1902, this plaintiff filed an application with the Department of the Interior of the United States of America for a permit for a right of way across, and permission to construct and maintain an electric power transmission line over and across the Coeur d'Alene Indian Reservation. That said application was made in pursuance of the provisions of the Act of February 15, 1901, (31 Statutes at Large, 790)" defendant has no sufficient information or knowledge to enable him to answer, therefore and upon that ground, denies

each and every allegation thereof and each and every allegation in said paragraph contained, and denies that prior to July 7, 1902, or prior to any other date, or on any other date or day, plaintiff, or any person in its behalf, filed an application with the Department of the Interior of the United States, for a permit for a right of way across, and permission to construct and maintain, or for a permit for a right of way across or permission to construct or maintain, or for a permit for a right of way across or permission to construct or maintain an electric power transmission line over and across, or over or across, the Coeur d'Alene Indian Reservation, which right of way was also over the above-described land; and denies that said application, or any other application for said purposes, was made in pursuance of the provisions of the Act of February 15, 1901 (Statutes at Large, 790). or that any application, whatsoever, was made, by plaintiff, or any person in its behalf, in pursuance of any other Act of Congress, for a permit for a right of way, or permission to construct and maintain, or permission to construct or maintain, an electric power transmission line over and across, or over or across, the Coeur d'Alene Indian Reservation, which right of way was also over the said Northeast quarter of Section 26, Township 47 N., R. 3 W. B. M.; and denies that the right, authority and permission, or right, authority or permission, applied for, if applied for, or any other right, authority and permission, or any other right, authority or permission, was given by the Honorable Secretary of the Interior, or by any other person having lawful authority to grant such right, authority, and permission, or such right, authority or permission, under date of July 7, 1902, or under any other date, or at all, and further denies that the use of the right of way, or the use of any other right of way, whatsoever, was permitted in accordance with the provisions of said Act of Congress and the regulations thereunder, or in accordance with the said Act of Congress or the regulations thereunder, or was permitted in accordance with any other provisions of said Act of Congress, or any provisions of any other Act of Congress, or was permitted at all.

Admits that the above-described land, of this defendant, was a part of the Coeur d'Alene Indian Reservation, and in the year of 1902, was unsurveyed and was not open to settlement, but denies that any right of way was ever sought by plaintiff, or any person in its behalf, or by any other person, over and across, or over or across, said land for any purpose, or purposes whatsoever.

Denies that said permit, or any other permit, so given, or in any other manner given to this plaintiff, or any person in its behalf, or any other person whatsoever, by the Secretary of Interior, or any other person having lawful authority to give such permits, on the 7th day of July, 1902, or on any other date, was over and across, or over or across,

the said Northeast quarter of Section 26, Township 47 N., R. 3 W. B. M.

And denies that the said permit above-mentioned, or any other permit, whatsoever, for said purposes, or for any other purposes, has ever since been and now is, or has ever been, or now is, in full force and effect, or in full force or effect; and further denies that said permit, or any other permit, whatsoever, was issued to plaintiff, or any other person, prior to the time when said lands were open to occupancy and settlement, or prior to the time when said lands were open to occupancy or settlement, or prior to any rights initiated by the defendant, or subsequent to said times, or at all.

IV.

Denies that pursuant to the said permit, or that pursuant to any other permit, the plaintiff did construct over and across, or over or across the Coeur d'Alene Indian Reservation a high tension electric power transmission line, and further denies that plaintiff ever had any permt, whatsoever, to construct over and across, or over or across, said reservation, or said land, a high tension electric power transmission line, or any other line.

Admits that plaintiff did construct, and is now maintaining a high tension electric power transmission line across the land that was formerly the Coeur d'Alene Indian Reservation, and particularly across the above-described land of this defendant but denies that it ever had, or now has, any permit

to so construct and maintain, or construct or maintain, said line across the land aforesaid; and admits that the right to maintain the same is of the value of more than Twenty-five Thousand (\$25,000.00) Dollars, but denies that plaintiff has ever had or now has any right to so maintain said line; and denies that plaintiff has any right under said permit, if such permit ever existed, or under any other permit relating to the land that was formerly part of said reservation and now belongs to this defendant; and further denies that the right to exercise the rights of plaintiff under said permit, is of the value of Twenty-five Thousand (\$25,000.00) Dollars, or any part thereof, or that the right of plaintiff, as relating to said land, is of the value of any other sum or sums, whatever.

V.

Denies that said plaintiff, under its said easement and right to construct a telephone line, or under its said easement or right to construct a telephone line, or under any other right and easement, or right or easement, to construct a telephone line across said lands, did also construct over and across, or over or across said right of way and upon the same poles, or over or across said right of way, or on the same poles, as the electric power transmission line was constructed, a telephone line. Admits that plaintiff did construct a telephone line over and across the said lands and upon the same poles, as the electric power transmission line, and

admits that plaintiff has been using the same for some time past, but denies that plaintiff ever had any authority, or permit, or right, whatsoever, to so construct said telephone line or any other line across the said lands. Admits that the right to maintain said telephone line is of great value, but denies that plaintiff has any right whatsoever to so maintain the same, or ever had any right to construct the same, upon said land.

VI.

Denies that it is necessary for the plaintiff to patrol the said lines and every part thereof, or said line or any part thereof; and denies that it is necessary for the plaintiff to patrol that portion of the said line which extends across the Northeast quarter of Section 26, Township 47 N., R. 3 W. B. M.; denies that, in order to patrol said line, the plaintiff did, under its permit and as a necessary part of the construction and maintaining of said line. or under its permit or as a necessary part of the construction and maintaining of said line, or under its permit or as a necessary part of the construction or maintaining of said line, or at all, construct along the said power transmission line a patrol road, which said patrol road was constructed during the years of 1902 and 1903, or during the year of 1902 or 1903, or during any other year or years, or at all; denies that plaintiff has used said patrol road, or any part thereof, or any other patrol road, since said time, or any part thereof;

or at all; and further denies that plaintiff ever had, or now has, any permit, or right whatsoever, to construct said power transmission line, telephone line, or patrol road, or that plaintiff ever had, or now has, any right whatsoever, to maintain the same upon said land of this defendant, and denies that said patrol road is a necessary part of the constructing and maintaining, or the constructing or maintaining said power line and telephone line or either of them.

Denies that said patrol road, or any part thereof, or any other patrol road, is covered by said easement and also by the said permit, or is covered by
said easement or by the said permit, or by any
other easement and permit, or by any other easement or permit, whatsoever; and further denies
that plaintiff now has or has ever had any easement or permit of any kind or nature in any manner connected with the aforementioned land of this
defendant.

VII.

Denies that by virtue of said facts, or by virtue of any facts, this plaintiff became vested by virtue of its said permit, or by virtue of any other permit, with the right to maintain and operate, or the right to maintain or operate its said electric power transmission line, or any other line, as provided in the said permit, if said permit ever existed, or any other permit, or at all; and denies that by virtue of such facts, or by virtue of any other

facts, the defendant took whatever right, title or interest that was vested in him by the government of the United States subject to the permit granted by the Government of the United States to plaintiff, or subject to any other permit granted by the United States to this plaintiff, or to any other person or persons, or subject to any permit, whatever, granted by any other person or persons having lawful authority to grant such permits; and denies that the title or interest of this defendant, in said land is subject to the permit, or any other permit, to use the said lands in connection with plaintiff's power transmission line; and further denies that the rights of defendant are subsequent to and subject to, or are subsequent to or subject to, the rights of this plaintiff under and by virtue, or under or by virtue, of said permit above described, or any other permit; and further denies that plaintiff now has, or ever had, any permit, right or rights, whatsoever, to use the above-described land in any manner; and denies that plaintiff's permit, if plaintiff ever had a permit, has never been revoked; and further denies that said permit is in full force and effect, or is in full force or effect, or is in force and effect, or has ever been in force or effect, upon the land of this defendant.

Denies that by virtue of said facts, or by virtue of any other facts, this plaintiff became vested by virtue of its said easement, or by virtue of any easement, to use said land in connection with its

telephone line, as provided in said easement, or any other easement, or at all; and denies that by virtue of such facts, or by virtue of any facts, the defendant took whatever right, title or interest that was vested in him by the Government of the United States by virtue of said patent, subsequent to and subject to, or subsequent or subject to, the easement granted by the Government of the United States, or subject to any other easement granted to this plaintiff by any person, whatsoever, having lawful authority to grant such easements; and further denies that the easement, or any other easement, to use said land in connection with its said telephone line has ever been granted to this plaintiff or any person in its behalf, or at all, by any person, persons, or state having the lawful authority to grant such easements across the land in question; and denines that the rights of the defendant are subsequent to and subject to, or are subsequent or subject to, the right of this plaintiff under and by virtue, or under or by virtue of said easement, or any other easement, or are subject to the rights of this plaintiff in any other manner, and further denies that plaintiff has any rights, whatsoever, in any wise connected with the said land of this defendant; and denies that said easement has never been revoked, and denies that it remains in full force and effect, or in full force or effect, or in force or effect; and further denies that any such

easement, has ever been, or now is, in force or effect.

VIII.

Denies that at the time of the issuance of said permit, if said permit was ever issued, to this plaintiff, or any person in its behalf, or at the time of the issuance of said easement, if said easement was ever issued, to this plaintiff, or at the time of the construction of said electric power transmission line, or at the time of the construction of said telephone line, or at the time of the construction of said patrol road along the same, the said defendant had no right, title or interest in or to said land or any part thereof.

Admits that on or about the 2nd day of May, 1910, the defendant made a homestead filing upon the land described as the Northeast quarter of Section 26, Township 47 N., R. 3 W. B. M., and thereafter made final proof on or about May 3, 1913, and thereafter patent of the United States was issued to defendant therefor on or about the 30th day of October, 1913, and that defendant holds under said title.

IX.

Denies that at the time said lands were settled upon by the defendant as also at the time the said lands were selected and filed upon by him, and at all times since, or at any of said times, the said permit and easement, or said permit or easement of this plaintiff, or any of them were in full force

and effect, or were in full force or effect, or were in force or effect, and denies that at said times, or at any of said times, said power line, telephone line and patrol road, or any of them, had been constructed over and across, or over or across, said lands, and denies that at any of said times, said telephone line or said power line, or said patrol road were used by the said plaintiff, and further denies that any rights acquired by the said defendant were subsequent to and inferior to, or were subsequent to or inferior to plaintiff's easement, or were subject to and inferior to, or subject to or inferior to plaintiff's said permit, or that defendant's right were in any manner, whatever, subject to any rights of plaintiff, or are now subject to any such rights; and further denies that plaintiff ever had, or now has, any right or rights, whatever in, over or to the land now belonging to this defendant.

Denies that at and before, or at or before, the defendant settled upon or filed upon said lands or initiated any rights thereto the said power transmission line, telephone line or patrol road were constructed over and across, or over or across, said lands; and denies that the plaintiff was maintaning or operating, or was maintaining and operating its said lines at the times aforesaid, or any of them; and denies that the said defendant at the time of acquiring any right had full notice and knowledge, or notice or knowledge, of plaintiff's

said easement; and denies that the plaintiff was operating the said telephone line thereunder at the times aforesaid, or that plaintiff had any such easement at said times, or at any other times or time; and denies that defendant had full notice and knowledge, or notice or knowledge of the plaintiff's said permit, or any other permit, and further denies that plaintiff ever had, or now has, a permit to go upon said land for the purposes of said telephone line, electric power transmission line, or patrol roand, or for purposes in anywise connected with the same or for any other purpose, or at all; and denies that for the purpose of caring for the said lines and for patrolling the same, renewing and repairing the same, or for any of said purposes, or for any other purposes, plaintiff had constructed and was using the said patrol road, or had constructed or was using the same; and denies that at the times aforesaid, or any of them, the said telephone line, electric power transmission line or patrol road crossed, the said lands described as the Northeast quarter of Section 26, Township 47 N R. 3 W. B. M.

Denies that the said defendant acquired any rights by virtue of his settlement and filing or by virtue of his settlement or filing upon said lands with full knowledge or any knowledge of all or any such facts; and further denies that they are facts; and denies that the patent issued by the Government of the United States, therefore was subject

to the rights of this plaintiff either under said permit, or any permit, or at all, or under said easement, or any easement, or at all; and further denies that plaintiff now has, or has ever had, any rights whatsoever, in any manner connected with the said land of defendant for any purpose or purposes, or at all.

X.

Denies that said permit so granted, or any permit granted to this plaintiff, or any person in its behalf, or to any other person whatsoever, for the maintenance of said electric power transmission line or the easement and rights, or easement or rights, of this plaintiff, for a right of way for said telephone line, or any other telephone line, granted under said two acts of Congress, or granted under any other act or acts of Congress, were acquired prior to any right acquired by defendant; and denies that the settlement and initiation, or the settlement or initiation, of the rights of the defendants on said lands was subsequent to the plaintiff acquiring the said rights by virtue of the said permit and by virtue of said easement, or either of them; and further denies that said patent was subsequent to plaintiff acquiring said rights by virtue of said permit or by virtue of said easement, or that said patent was subsequent to or subject to any right, easement, or permit given to this plaintiff, or otherwise acquired by it in any manner whatsoever; and further denies that plaintiff

ever had, or now has any such right, or any other right, or rights in anywise connected with said land; and denies that said patent did not effect, revoke and annul, or did not effect, or revoke, or annul, either the said permit or the said easement, if either ever existed; and denies that the plaintiff has at all times since the granting thereof, or at any of said times, had the right to operate and maintain or the right to operate or maintain the same, or ever had, or now has, any such right; and denies that plaintiff has had or now has the right to patrol the same or to maintain for that purpose the said patrol road along the same; and further denies that said patrol road is a necessary incident to the maintenance of said power transmission line, or is a necessary incident to any other right or rights of this plaintiff; and further denies that plaintiff ever has had or now has, any such rights or any rights whatsoever, in, over, or to said land.

XI.

Denies that the extension of any fence across the right of way now occupied by plaintiff's line, or the building or extending of any fence or fences in any manner whatever on the land of this defendant above-described, has deprived or will deprive plaintiff of any rights whatsoever, now held or at any time held or owned by said plaintiff, which rights are in any manner connected with said land; and further denies that plaintiff now has, or has ever had any right in, to, or over the lands afore-

mentioned; and denies that any act or acts of defendant in any manner connected with the said Northeast quarter of Section 26, Township 47 N., R. 3 W. B. M., has, or will deprive this plaintiff of any right or rights whatsoever.

XII.

Denies that the said homestead entry and settlement, or either of them, of the defendant and the said patent of the United States issued pursuant thereto, were all, or any of them subject to the rights of plaintiff; and denies that said patent did not modify, annul, revoke and cancel the said permit and said easement and each of them.

And denies that the acts, or conduct of this defendant, in any manner connected with said land, will, or has deprived or prevented plaintiff from enjoying its rights under the said permit and under the said easement, or either of them, and denies that plaintiff now has or has ever had any right, or rights whatsoever in any manner connected with the aforementioned land, for any purpose or purposes, or at all; and further denies that plaintiff now has, or has ever had any permit or easement to go upon or occupy said land for any purpose or purposes, whatsoever.

FOR A FURTHER, SECOND, SEPARATE AND AFFIRMATIVE DEFENSE TO PLAINTIFF'S ALLEGED CAUSE OF ACTION, DEFENDANT ALLEGES:

I.

That at all times herein mentioned, defendant has been and now is a citizen of the United States of America, over the age of 21 years; and now is and during all the times hereinafter mentioned has been, a citizen of the United States and of the State of Idaho.

II.

That prior to the 2nd day of May, 1910, the land mentioned in plaintiff's complaint, and described as the Northeast quarter of Section 26; Township 47 N.; R. 3 W. B. M., Kootenai County, Idaho, was a part of the unappropriated Public Domain of the United States; and thereafter and on or about the 2nd day of May, 1910, defendant duly, regularly and in conformity with the law made a homestead filing upon said land; and thereafter, and on or about the 3rd day of May, 1913, duly and regularly made final proof upon said land; and thereafter and on or about the 30th day of October, 1913, a patent for the land described as, the Northeast quarter of Section 26; Township 47 N.; R. 3 W. B. M., was duly and regularly issued by the United States of America to this defendant.

III.

That said patent, so issued, from the United States to this defendant, conveyed all the right, title and interest of said grantor in and to said land to this defendant, free from all permits, licenses, easements and sevitudes of whatsoever kind

or nature, except, "Any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts; and there in reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States, and all the coal or cil deposits therein or thereunder," and is in words and figures as follows:

Coeur d'Alene 03983

4-1023

THE UNITED STATES OF AMERICA.

To all whom these presents shall come, Greetings: WHEREAS. a Certificate of the Register of the Land Office at Coeur d'Alene, has been deposited in the General Land Office, whereby it appears that full payment has been made by the claimant, John Swendig, according to the provisions of the Act of Congress of April 24, 1820, entitled, "An Act making further provision for the sale of the Public Lands" and the acts supplemental thereto, for the Northeast quarter of Section twenty-six in Township forty-seven north of range three west of the Boise Meridian, Idaho, containing one hundred sixty acres. according to the Official Platt of the Survey of the said Land, returned to the General Land Office by the Surveyor-General.

NOW KNOW YE, That the UNITED STATES OF AMERICA, in consideration of the premises,

and in conformity with the several Acts of Congress in such cases made and provided, GIVEN AND GRANTED, and by these presents DOES GIVE AND GRANT, unto the said claimant and to the heirs of the said claimant the Tract above described: TO HAVE AND TO HOLD the same, together with all the rights, privileges, innunities, and appurtenances, of whatsoever nature, thereunto belonging, unto the said claimant and to the heirs and assigns of the said claimant forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts; and there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States, and all the coal or oil deposits therein or thereunder.

IN TESTIMONY WHEREOF, I, Woodrow Wilson, President of the United States of America, have caused these letters to be made Patent, and the seal of the General Land Office to be hereunto affixed.

GIVEN under my hand at the City of Washington, the Thirtieth day of October, in the year of our Lord one thousand nine hundred and thirteen

and of the Independence of the United States the one hundred and thirty-eighth.

By the President,

WOODROW WILSON.

By M. P. LeROY.

L. A. C. LAMAR,

Recorder of the General Land Office.

RECORDED: Patent Number 363017.

IV.

The defendant has, at all times since the issuance of said patent, held title to said lands, therein described, under said patent and has owned, possessed and occupied said premises under said patent and grant and in accordance with the title and rights thereby granted, conveyed and conferred, and now so holds the same.

WHEREFORE defendant prays:

That the plaintiff's action be dismissed and it take nothing thereby and that defendant be given his costs and disbursements herein.

> J. F. AILSHIE, RAY AGEE,

Attorneys for Defendant, Residence and Post Office Address, Coeur d'Alene, Idaho.

STATE OF IDAHO,) ss County of Kootenai,)

John Swendig, being first duly sworn, on his oath deposes and says: That he is the defendant in the above-entitled action; that he has read the foregoing

answer, knows the contents thereof and believes the facts therein stated to be true.

JOHN SWENDIG,

Subscribed and sworn to before me this 23rd day of October, 1920.

(Seal)

M. W. FROST,

Notary Public, in and for the State of Idaho, residing at Harrison, Idaho.

Endorsed: Filed October 27, 1920. W. D. McREYNOLDS, Clerk. By L. M. Larson, Deputy.

(Title of Court and Cause.)

MOTION TO DISMISS.

Now comes the defendant and moves the Court to dismiss plaintiff's pretended action herein for the reasons and upon the grounds following:

I.

That the complaint does not state facts sufficient to entitle plaintiff to any relief whatever. That it appears upon the face of the complaint that defendant holds a patent from the United States for the fee simple title and Estate in and to the whole of the lands over which plaintiff's pole, power and telephone line extends and that at the time of the issuance of said patent the United States made no reservation of title whatever, either to itself or for the use or benefit of plaintiff or any one else for a power line, telphone or pole line of any kind. That

it appears upon the face of the Complaint that plaintiff has no grant or easement of any kind from the defendant's grantor the United States, or from defendant or any one to go upon or maintain its pole, power or telephone line on or across defendant's land.

II.

That the Hnorable Secretary of the Interior had no power or authority of law to give or convey title, or an easement or an irrevocable license to plaintiff for the purpose of maintaining a power, pole, telephone, transmission or other lines across said lands and that he did not and could not do so and that the United States has parted with all its right and title in and to said lands and that by said grant the Honorable Secretary of the Interiorn has lost all power of control or supervision over said land and any license or permit to any one to go upon or across the same has been thereby revoked and that the issuance of patent was a revocation of all previous permits and licenses given or granted.

III.

That no reservation of any title or right was made in or by said patent and that no implied reservation did arise, or was made and that none exists and that any such reservation is inconsistent with the terms of the grant contained in defendant's said patent.

WHEREFORE, defendant prays that plaintiff's pretended action be dismissed and its complaint be

held for naught and that defendant be awarded his costs herein.

J. F. AILSHIE, WM. H. BONNEVILLE,

Attorneys for Defendant, P. O. Address, Coeur d, Alene, Idaho.

Endorsed: Filed, June 7, 1920. W. D. McREYNOLDS, Clerk. By. L. M. Larson, Deputy.

(Title of Court and Cause.)

MEMORANDUM DECISION UPON MOTION TO DISMISS.
Sept. 18, 1920.

John P. Gray and W. F. McNaughton,

Attorneys for Plaintiff.

J. F. Ailshie,

Attorney for Defendant.

DIETRICH, DISTRICT JUDGE:

Admittedly the motion to dismiss in this case involves precisely the same question that was disposed of in Washington Water Power Company v. Harbaugh, 253 Fed. 681, but in view of the earnestness with which counsel for the defendant has represented it, I have given it additional consideration. While, as originally suggested, the question is not entirely free from doubt, I am not convinced that the conclusion reached is erroneous. It is

true that the patent upon its face purports to be absolute, but as pointed out in the Harbaugh case, at the time it was issued there was in force the following express general regulation: "The final disposal by the United States of any tract traversed by a right of way permitted under the said act shall not be construed to be a revocation of such permission in whole or in part, but such final disposal shall be deemed and taken to be subject to such right of way until such permission shall have been specifically revoked in accordance with the provisions of said act." I am inclined to think that the defendant took his patent subject to the reservation thus provided for, and that in effect his status is the same as it would have been had the language of the regulation been written into the patent. There cannot, at this stage at least, be any contention that the defendant was ignorant of the plaintiff's interest, for it was in open possession of the right of way and was using the same; and it must be assumed that the defendant knew of the regulation. What view should be taken in a case where the patent issued prior to the promulgation of the regulation need not be discussed.

Accordingly, the motion will be denied, and a like order will be entered in each of the cases numbered 752, 753 and 755.

Endorsed: Filed Sept. 18, 1920.

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

STATEMENT OF CASE.

Be it remembered that on the 23rd day of May, 1921, the case of Washington Water Power Company, a Corporation, vs. John Swendig, No. 752; the case of Washington Water Power Company, a corporation, vs. James W. Miller, No. 753; the case of Washington Water Power Company, a Corporation, vs. Remigus Grab, No. 754, and the case of Washington Water Power Company, a Corporation, vs. Anthony Kerr, No. 755, and each of them came on for trial before the Court without a jury at Coeur d'Alene, Idaho. John Gray appearing for plaintiff and J. F. Ailshie and Ray Agee appearing for each of the defendants.

It appeared that the same question was involved in each of said cases, and upon stipulation of attorneys, in open Court, the cases were consolidated by order of the Court for trial upon both law and the facts for all purposes in this and all Courts, and for all purposes as entitled above, and thereupon the following evidence was introduced, and the following proceedings had, as hereinafter set out in this statement of the case, to-wit:

FRANK LANGLEY, a witness called and sworn on behalf of plaintiff, testified as follows:

DIRECT EXAMINATION.

By MR. GRAY.

I am Register of the Government Land Office in this city. I have under my charge the plats of townships in this land district. I have with me plats of townships 42-7 and 47-3 West. These plats are official records of our office. Said plats were thereupon offered in evidence by Mr. Gray as Plaintiff's Exhibits No. 1 and 2 and leave asked to substitute certified copies.

MR. AILSHIE: I object to this as incompetent and immaterial, and not only that, but it tends to incumber the record, and it covers matters that are not in issue here. It only affects the lands of one quarter section of land involved here, and there is no issue as to the power line running across the lands that we have taken patents for.

MR. LANGLEY: These plats are now in the condition in which they were when they were first filed in our office in so far as showing the power line across the plats. The electric power line shown on the two plats was there when it was filed in our office. This is not the original plat that was filed. It is a certified copy. The original was destroyed by fire in October, 1911, and the tract books in the office show the date of filing of the original plats. For township 47-2 West, the filing date is May 2, 1910. For 47-3 West, it is May 2, 1910. These plats are copies , certified to by the Recorder of the General Land Office, filed to replace the old original plats that were burned in the fire.

Offered in evidence.

Objection overruled; Plaintiff's exhibits 1 and 2 admitted.

Thereupon the Court granted exceptions to both parties to all adverse rulings, including the foregoing ruling.

MR. LANGLEY: This is the copy of a circular with respect to entries of lands in the Coeur d'Alene Indnian reservation, issued by Mr. Witten, with respect to entries being subject to railroad rights of way and power transmission lines. I did not look for the original. It came with a letter from the Commissioner of the General Land Office.

Q. Are you able to tell the date that circular was originally issued?

Objected to as not the best evidence of the date when issued.

Objection overruled.

A. I am not able to tell the date. I might be able to find the date. I haven't looked for it. I have such circular with reference to the Coeur d'Alene Indian Lands in my files. The one I have found is attached as an exhibit to a letter from the Commissioner of the General Land Office, dated July 8, 1921, I do not know whether or not one of these was received at any previous time.

Q. Is the certified copy which I have here a copy of the letter which you have in your files?

Objected to as not the way to prove copies. Sustained.

MR. GRAY: Well, I will offer that in evidence, and in lieu of it I will offer a certified copy.

Objected to as incompetent to prove any facts in issue, and on the ground that it was not issued by the Secretary of the Interior or the Commissioner of the General Land Office, and hasn't the force or effect of an executive order or an order of the Department, and upon the further ground that this circular provides that, "All lands for which rights of way have been obtained for railroads or power transmission lines must be entered subject to such rights of way," and the permit for power transmission is only a license and not an easement.

Received subject to the objection which was to be considered later.

CROSS-EXAMINATION.

By Mr. Ailshie.

I have no memory of the original plat of which this is a certified copy. I couldn't identify or remember any particular line or thing that is on this copy. I cannot say of my own knowledge whether or not these lines indicating a power line were on there when the original plat was filed in our office.

Thereupon a certain plat was marked PLAINTIFF'S EXHIBIT NO. 4.

MR. GRAY: I desire to offer in evidence a map, the original easement and grant from the Secretary of the Interior to the Washington Water Power Company, for a telephone line across the Coeur d'Alene Indian reservation, marked for identification as Plaintiff's Exhibit No. 4.

Objected to as not identified or proven to be a plat or map issued, or permit granted by the Department.

Overruled; Plaintiff's Exhibit No. 4 admitted. Thereupon certain papers were marked

PLAINTIFF'S EXHIBITS NOS 5, 6, 7, 8, 9, and 10.

MR. GRAY: I desire to offer in evidence a file of correspondence marked Exhibits 5 to 9, inclusive, and Plaintiff's Exhibit No. 10, the voucher for \$224.00 of the Washington Water Power Company, received by E. A. Hitchcock, Secretary of the Interior, showing the appraisal of damages for that right of way, and the payment to the Government of the United States.

MR. AILSHIE: I object to each of the offered exhibits not because it is not shown that they are what they purport to be, but because they are incompetent to prove any issue in the case and not the best evidence.

Overruled; Plaintiff's Exhibits 5 to 10 inclusive, admitted.

Thereupon a certain paper was marked PLAINTIFF'S EXHIBIT NO. 11.

MR. GRAY: I desire to offer the permit, a certified copy of the permit for a power transmission line over the Coeur d'Alene Indian Reservation.

THE COURT: I don't know that this correspondence is identified with this particular right of way, gentlemen.

MR. GRAY: I will do that later, if Your Honor please. This is a certified copy of the original.

EUGENE LOGAN, a witness produced and sworn on behalf of plaintiff, testified as follows:

DIRECT EXAMINATION.

By MR. GRAY.

I am a civil engineer residing in Spokane. was educated at Washington State College. I have been engaged in the practice about thirteen or fourteen years. At present I am engineer for the Washington Water Power Company. I have been with the company about thirteen years. I am familiar with the telephone line and the power transmission line in question here. This is the only line across the Coeur d'Alene Indian reservation. Both lines are on one line of poles. I have seen Plaintiff's Exhibit 4 and also Exhibit 11. I have surveyed that line out since. The lands were subdivided into townships and sections and other legal subdivisions. I have a map showing the line as it crosses the lands of the defendants. I have surveyed it across the lands of each defendant. It is the same line that is shown upon Exhibits 4 and 11, and in the same place. I made the survey in 1909. The Company has never had any other telephone line or power transmission line, across the Coeur d'Alene Indian Reservation and these lines have been located in the same position ever since I have been with the company. I have maps showing the line as it crosses the individual lands of the defendants. These two maps show the line across the lands of the four defendants.

PLAINTIFF'S EXHIBITS NOS. 12 and 13 were then offered in evidence.

Objected to on the same grounds as other objections to exhibits.

Overruled, and Plaintiff's Exhibits 12 and 13 were admitted.

CROSS-EXAMINATION.

By MR. AILSHIE.

I made the last survey in 1909. I was through there last fall. I haven't made any survey since that time. The telephone wires and transmission wires are on the same poles. The current carried over that line is approximately sixty thousand volts. These poles are principally thirty-five foot poles, with a seven-inch top. There is one transmission wire that is on an insulator which sets on top of the pole. It is a three-wire transmission. The other two are on a single cross arm. The telephone wire is on another cross arm either seven or nine feet below the transmission wire. I do not know which was constructed first, the transmission line or the telephone line. They were on there the first time I was there. They would not be likely to put in poles of that size if it was constructed for a telephone line in the first place. Those are not standard telephone poles.

RE-DIRECT EXAMINATION.

By MR. GRAY.

I couldn't see any difference in the position of the line last fall and when I made my survey.

JOHN B. FISKEN, a witness produced and sworn on behalf of plaintiff, testified as follows:

DIRECT EXAMINATION.

By MR. GRAY.

I am an electrical engineer residing in Spokane. I was educated at the Government College in Glasgow, Scotland, and I have followed it since 1886— 35 years. I had charge of the construction of the Washington Water Power Company's lines from about 1904 until three years ago. I had charge of the maintenance and operation of all the transmission lines up to about three years ago. I have been with the Washington Water Power Company since 1887. The first power line was finished in the Coeur d'Alenes in the summer of 1903. I am familiar with the manner of construction of this line. It is necessary to watch the condition of the line, to anticipate repairs and renewals, and make repairs at the time of the patrol, if it can be done, and generally to see that the line is in shape to give service. We have to watch for the condition of the insulators, to note whether they are cracked or not, whether any of the tie wires, which tie the conductors to the insulators, are coming off or not, to note the condition of the insulators on the telephone line and also the tie wires, to see that there is no liability of the telephone line or the transmission lines getting tangled up; to note the condition of the poles from the ground up, and on occasion to make tests of the poles below the ground line; to note the condition of the surroundings of the poles, from fire risk standpoint; also from the standpoint of safety in case of washouts.

Q. Mr. Fisken, does that line serve any important use? If so, what?

Objected to as immaterial and incompetent. Overruled.

It serves the Coeur d'Alene Mining District, the mines, mills, smelters, and dredges, besides the distribution systems in Kellogg and Wardner, Osborne and Wallace. That line was always patrolled while I was in charge. It was usually patrolled by a man on horseback, and sometimes on snowshoes. practice continued from 1903. The patrolmen were located along the line at intervals, depending upon the difficulties of getting along the patrol road. They always carried a telephone and their body tools, some small insulators and a little wire. At times they would have more than that, but that was the regular equipment. A patrolman could make any repairs on the telephone line at any time, and he could repair poles. He could not handle the high tension transmission wires. Service had to be interrupted to do it. There was a patrol road established when the line was built. It was close to the poles wherever it could be. There were a fev.

places where it was impossibl to put a patrol road right along the line. It is necessary to have a patrol road along a transmission line, with the right to freely go along it. It is necessary to use a road or right of way for the repair of the lines, it is necessary to enable repair materials to be hauled in. It is necessary to repair poles occasionally. The average life of a pole is about 15 years. A patrolman should pass not more than fifty to seventy-five feet from the line. The right of way should be a minimum of fifty feet on each side of the line. It is necessary in timbered country to enable men to get in there in case of fire in the adjacent timber. It is necessary for replacing either permanent or temporary guys, and for raising poles.

CROSS-EXAMINATION.

By. MR. AILSHIE.

I don't know whether or not there has even been any road through any of the places owned by these defendants. I did not patrol the line at that point. All I know is that I have employed men up there for that purpose. I do not know where these premises are. We would need fifty feet on each side of the line through a man's field. It is necessary for guys and handling the poles. I don't know whether or not we have used it in this particular location. A great many of the poles in this location have been stubbed. Some have been replaced.

LEROY HOOPER, a witness produced and sworn on behalf of the plaintiff, testified as follows:

EXAMINATION.

By MR. GRAY.

I am a patrol man for the Washington Water Power Company, residing at Medimont, Idaho. I patrol from Rose Lake on the East to the St. Joe River on the West. I patrol the complete line once a week when weather conditions permit. I make repairs both permanent and temporary. I haven't replaced any poles since I have been on the job, but I have stubbed some of them. I have been working there since the 19th day of September, 1920. I have stub-poles which have broken off and partially fallen over. I patrol for anything unusual along the line, either growth of trees, or broken insulators, wires, or poles leaning over. I observe the conditions of the poles as I go along. I should pass within not more than one hundred feet from the poles. I have not been able to travel along there on my horse or wagon that close to the line. In places there are solid fences, and no gates. I follow the road. The only way I can follow the pole line is on foot. It is necessary to go along the pole line to replace a pole, with a team, at least one horse.

CROSS-EXAMINATION.

By MR. AILSHIE.

I have been acquainted with the patrol line

through the places of the defendants since last September. I was over the line with a previous patrol man a number of times before that. I do not know whether or not there has ever been a patrol road along the line through there or not. My recollection is that in patrolling with my brother, about nine years ago, we followed the pole line with a buggy. I couldn't say who owns the land over which we crossed. We patrolled with a buggy, and followed the pole line. I was not familiar, at that time, with who owned the lands. We could go practically the whole line. The country is rolling through there. It is not passable with the buggy at the present time. I was speaking of nine years ago. The road in some places at the present time is a quarter of a mile from the pole line. We go in there on nfoot. It has not always been the same. The first time I saw it, about nine or ten years ago, we practically followed the pole line from the top of the hill above Medimont to the brow of the hill overlooking the St. Joe River near Chatcolette, South of Harrison.

RE-DIRECT EXAMINATION.

By. MR. GRAY.

The road East of Mr. Swendig's place follows or crosses the power line. I follow that road past his place, the road passes to the North, and I follow the road until I come to Mr. Miller's land, when I enter his land, which I think is at the corner, and

then I come back to the power line and after winding back of Miller's house and barn, I get to the power line. I follow the public road. It takes me in places half a mile from the line; the timber is so thick that I can't see the line in places for four or five miles at a stretch. If I want to go over the line I have to get out and walk over to it. The ground along the pole line across Swendig's place was plowed up when I went through in April.

RE-CROSS EXAMINATION.

By MR. AILSHIE.

When I spoke of four or five miles through timber, I did not refer to Swendig's place. It was three or four miles East of his place, over toward Kellogg.

RE-DIRECT EXAMINATION.

By MR. GRAY.

The power line runs diagonally across Swendig's place, and when the power line crosses the road of course I am at the line, and then I go straight ahead along the road which I think is a section line and I will be a quarter of a mile from it at the greatest distance. I don't know Kerr's land and Grab's land by the description from the map, but I know where it lies in reference to the power line. The public road is about half a mile to a mile from the power line as it crosses Kerr's place.

ALBERT H. BECKWITH, a witness produced and sworn on behalf of plaintiff, testified as follows:

DIRECT EXAMINATION.

By MR. GRAY.

I am an electrical engineer, residing at Spokane, Washington. I was educated at McGill University, Montreal, and have been practicing since May, 1906. I am assistant to the Superintendent of Light and Power with the Washington Water Power Company. I am familiar with the line of the Company which extends across what was formerly the Coeur d'Alene Indian reservation, also across the lands of the defendants. I was over that line about a week ago. I have been assistant on the maintenance work since 1918. We have maintained a patrol along that line all the time. It is necessary to patrol this line because the poles are now getting to an age that they are deteriorating very rapidly. and we have to stub them. We have to observe broken insulators, broken wires, and keep our telephone line operating properly, to keep in communication with the Coeur d'Alene Mining District. A patrolman should pass immediately along the line. A patrol road is necessary to enable us to drialong the line, because we have to haul subs and wire and hardware for making necessary repairs. or if poles burn down, we have to haul poles in on the line to replace the ones burned down. Sometimes the entire poles have to be taken in, in place of stubs. The right of way should be one hundred feet wide. So that in case a pole falls over it may be replaced by a new one, you would have to use that much ground, fifty feet on the side of the line, at least, to get another pole up into place again and get that one out of the way. Here and there we have to put temporary guys on, and they have to be set back from the line far enough so that they will hold the pole in position. The contour of the country is not always such that we can run right along at the foot of the poles.

E. S. CRANE, a witness produced and sworn on behalf of plaintiff, testified as follows:

DIRECT EXAMINATION.

By MR. GRAY.

I reside at Coeur d'Alene, and am right of way agent for the Washington Water Power Company. I have been working for the company for sixteen years. The Company did not build any other telephone line or power line across the reservation other than the high power line. It was built in 1902 and 1903. I know the lands of the four defendants. There was a patrol road built all the way along that line, and it was the only road that was built into that country to that day, up to 1910. It was the only road. It crossed the lands of the defendants before they filed on them. I was over their lands last year. Some of it was plowed up.

The patrol road is fenced off. I went around a different road, the County road, I think it is. The power line is at the same place as it originally was. The right of way for this telephone and power line across the reservation was appraised by Major Anderson. He was Indian Agent, I think his headquarters were at Spokane, but he had charge of the Coeur d'Alene Indian Reservation.

MR. GRAY: I desire to offer a certified copy of the letter of the Secretary of the Interior to the Commissioner of the General Land Office, dated August 23, 1912.

Objected to on the ground that it is incompetent to prove any easement or franchise or other right in the real estate in question.

Overruled; Plaintiff's Exhibit 14 admitted.

J. W. MILLER, a witness produced and sworn on behalf of defendants, testified as follows:

DIRECT EXAMINATION.

By MR. AILSHIE.

I am one of the defendants. I made entry upon the tract of land described in the complaint served on me; also final proof. Defendant's Exhibit No. 1 is the patent that was issued to me for this land.

Defendant's Exhibit No. 1 admitted in evidence and copy thereof contained in answer substituted for original patent. I have been the owner of this land ever since I received my patent for it. I am still the owner and have been in possession of it during all that time.

CROSS-EXAMINATION.

By MR. GRAY.

This power line across my land was there when I first settled on the land. I knew it when I made my first entry. It is in the same place as it was at that time.

JOHN SWENDIG, a witness produced and sworn on behalf of defendants, testified as follows:

DIRECT EXAMINATION.

By MR. AILSHIE.

I reside on a farm at Harrison, and I am one of the defendants. I filed and made final proof on the land described in the complaint against me. I also received patent for it. Defendants' Exhibit No. 2 admitted in evidence and the copy thereof contained in the answer substituted for the original patent.

I have owned this land ever since I received patent for it. and am still the owner. I have been in possession of it all the time since I first entered it. There has not been exactly a road along the pole line. It was passable at all times. I don't know that I ever remember of a road being there.

CROSS-EXAMINATION.

By MR. GRAY.

When I first settled here, this pole line, power transmission line and telephone line were constructed across the land. I don't know whether or not it was there when I made my entry. I was not sure of my lines. The power line was there at that time. I don't remember whether or not the line was shown on the plat in the land office or not. I examined the plat. I don't remember about the power line. I did not consider it at that time. It was there before I settled.

REMIGUS GRAB, a witness produced and sworn on behalf of the defendants, testified as follows:

DIRECT EXAMINATION.

By MR. AILSHIE:

I live at Harrison on a farm. I am one of the defendants. I made entry on the lands described in the complaint served on me. I made final proof on the same. Defendants' Exhibit No. 3 is the patent that was issued to me for this land.

Defendants' Exhibit No. 3 was thereupon admitted in evidence and the copy thereof included in the answer substituted for the original patent.

I have owned that land ever since I received the patent and am still the owner. I have been in possession of it all that time.

CROSS-EXAMINATION.

By MR. GRAY.

When I settled on the land the power line of the Washington Water Power Company ran across it. I didn't know it at first but I saw it was there when I filed on it. It has been there ever since.

RE-DIRECT EXAMINATION.

By MR. AILSHIE.

I filed on it here at Coeur d'Alene. I asked them about the power line, and they told me I couldn't fence it up so long as the government owned it. They told me that when I had a patent for it then I could do as I pleased with it. No one would have any rights to it.

RE-CROSS EXAMINATION.

By MR. GRAY.

The people in the land office told me that. I don't know who the officer was. And I asked them about the road and about getting through the place, and they said I couldn't fennce it up so long as it belonged to the Government, yet, and when I get a patent it is my own, and I am the boss myself on it. Mr. Whitney made that statement, a couple of them there made it.

MR. GRAY: I move to strike that out if Your Honor please.

Motion sustained.

ANTHONY KERR, a witness produced and sworn on behalf of defendants, testified as follows:

DIRECT EXAMINATION.

By. MR. AILSHIE.

I reside at Harrison, Idaho, on a farm. I am one of the defendants. I filed upon the tract of land described in the complaint which was served on me in this action, and made final proof upon it. I received a patent for the land. It is the document marked Defendants' Exhibit No. 4. I have owned that land ever since, and am still the owner of it, and have been in possession of it ever since that time.

Thereupon Defendant's Exhibit No. 4 was admitted in evidence and the copy thereof contained in the answer substituted for the original patent.

CROSS-EXAMINATION.

By MR. GRAY.

The power line and telephone line had been constructed across that land when I first saw it. I knew it before I filed on the land. It has been there ever since.

MR. AILSHIE: I now offer in evidence a certified copy of the order and decision of the Secretary of the Interior, of date April 23, 1921, construing and passing upon the effect of the order of August 24th that has just been introduced by plaintiff.

Objected to on ground that it doesn't construe the order of August 24th.

Overruled; and Defendants' Exhibit No. 5 admitted in evidence, which is a copy of the certified copy of said order and decision, dated April 23, 1921.

And be it further remembered that the foregoing comprises all the evidence that was introduced or considered upon the trial of said consolidated causes.

And now come the defendants and submit the foregoing draft of statement of case and exceptions and pray an order settling the same.

Dated this 24th day of June, 1921.

J. F. AILSHIE, and RAY AGEE,

Residing at Coeur d'Alene, Idaho.

Attorneys for Defendants.

Settled, allowed and ordered filed as Statement of Case and Exceptions this 26th day of July, 1921.

FRANK S. DIETRICH,

District Judge.

Lodged June 24, 1921.

W. D. McREYNOLDS, Clerk.

By L. M. LARSON, Deputy.

Endorsed: Filed July 26, 1921.

W. D. McREYNOLDS, Clerk.

By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

DECREE.

The above causes came on to be heard before the Court at Coeur d'Alene, Idaho, on the 23rd day of May, 1921.

It appeared that the same question was involved in each of said cases, and the attorneys for the parties stipulating thereto and the Court believing that it was proper that said causes be consolidated, it was ordered that the said four cases be consolidated and tried as one case.

Thereupon the Court heard the evidence adduced by the parties and the argument of counsel, and the case having been submitted for the decision of the Court, and the Court having heretofore made its decision herein, and now being well advised in the premises, upon consideration thereof,

IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

(1) That the permit granted and given by the Secretary of the Interior of the United States to the plaintiff, The Washington Water Power Company, in pursuance of the provisions of the Act of Congress of February 15, 1901 (31 Stat. at Large, 790) and dated July 7, 1902, for a right of way across and permission to construct and maintain an electric power transmission line over and across the Coeur d'Alene Indian Reservation, and over and across, together with other lands, the

Northeast quarter of Section 26, Township 47

N. R. 3 W. B. M.

The North half of the Southwest quarter and the Southeast quarter of the Northwest quarter of Section 26, Township 47 N. R. 3 W. B. M.

The Northeast quarter of Section 24, Township

47 N. R. 3 W B M.

Lot 2 and the Southeast quarter of the Northwest quarter of Section 19, Township 47 N. R. 2, W. B. M. is a valid and subsisting permit and in full force and effect, and the plaintiff, The Washington Water Power Company, is in possession of said right of way and of said power transmission line constructed over and along said right of way and is the owner of said permit and power line.

(2) That the plaintiff, The Washington Water Power Company, is the owner of a right of way easement for a telephone line upon and across, together with other lands, the said

Northeast quarter of Section 26, Township 47

N. R. 3 W. B. M.

The North half of the Southwest quarter and the Southeast quarter of the Northwest quarter of Section 26, Township 47 N. R. 3 W. B. M.

The Northeast quarter of Section 24, Township

47 N. R. 3 W B M.

Lot 2 and the Southeast quarter of the Northwest quarter of Section 19, Township N. R. 2, W. B. M. which easement for right of way was acquired by the plaintiff under the provisions of Section 3 of an Act of Congress approved March 3rd, 1901, entitled "An Act making appropriation for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with va-

rious Indian tribes for the fiscal year ending June thirtieth, nineteen hundred and two, and for other purposes," which said right of way easement was granted by the Secretary of the Interior of the United States under date of April 15, 1902, and which said right of way is identical with the said right of way for the electric power transmission line, referred to in paragraph 1 of this decree, and said telephone as now constructed is incidental to the use of the said power transmission line, and the said right of way easement so granted is now in full force and effect and is a valid and subsisting easement for right of way.

(3) That the plaintiff is entitled to maintain along said power transmission line and telephone line a roadway, which said roadway must be within fifty feet of the center of said line as the same is now constructed over and across the lands described as follows:

Northeast quarter of Section 26, Township 47 N. R. 3 W. B. M.

The North half of the Southwest quarter and the Southeast quarter of the Northwest quarter of Section 26, Township 47 N. R. 3 W. B. M.

The Northeast quarter of Section 24, Township

47 N. R. 3 W B M.

Lot 2 and the Southeast quarter of the Northwest quarter of Section 19, Township 47 N. R. 2, W. B. M. and the agents, servants and employes of the plaintiff are entitled to go along said power transmission line at all times and to keep and maintain said roadway for such purpose.

- (4) Plaintiff is further entitled, in making repairs or renewals, to the use of such land within fifty feet of the center of said line as may be necessary for renewals.
- (5) That the title of the defendant, John Swendig to the land described as the Northeast quarter of Section 26, Township 47 N. R. 3 W. B. M., is subject to the foregoing rights of the plaintiff.

That the title of the defendant, James W. Miller, to the land ndescribed as the North half of the Southwest quarter and the Southeast quarter of the Northwest quarter of Section 26, Township 47 N. R. 3 W. B. M., is subject to the foregoing rights of the plaintiff.

That the title of the defendant, Remigus Grab, to the land described as the Northeast quarter of Section 24, Township 47 N. R. 3 W. B. M., is subject to the foregoing rights of the plaintiff.

That the title of the defendant, Anthony Kerr, to the land described as Lot 2 and the Southeast quarter of the Northwest quarter of Section 19, Township 47 N. R. 2 W. B. M., is subject to the foregoing rights of the plaintiff.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that if any one of the defendants maintains any fence or fences on, around or across said lands, he must provide gates therein for the plaintiff's use of sufficient width for the passage of ordinary vehicles at the places where

said roadway passes through any such fence, and the plaintiff shall furnish locks and keep said gates locked.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the said defendants and each of them, and all persons acting under the authority of any of them, or pretending so to act, and all successors in interest of said defendants and of each of them, be and they hereby are perpetually enjoined and restrained from interfering with the plaintiff in the operation and maintenance of the said electric power line and said telephone line and said patrol road over and across the said lands described as follows:

The Northeast quarter of Section 26, Township 47 N. R. 3 W. B. M.

The North half of the Southeast quarter and the Southeast quarter of the Northwest quarter of Section 26, Township 47 N. R. 3 W. B. M.

The Northeast quarter of Section 24, Township

47 N. R. 3 W. B. M.

Lot 2 and the Southeast quarter of the Northwest quarter of Section 19, Township 47 N. R. 2 W. B. M..

and from interfering with the agents, employes and officers of said plaintiff in patrolling and inspecting the said line and going along said roadway at any and all times, and from in any manner interfering with the plaintiff in making repairs or renewals thereof or in conveying materials therefor along said road.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the rights of the plaintiff shall be limited to a strip of land fifty feet on each side of said electric power transmission line as the same is now located upon the ground, and that subject to the plaintiff's reasonable needs for the uses herein defined, the defendants shall have the right to occupy and utilize said strip of land, and the plaintiff and its employes in going along said road must use reasonable care to do no more injury to the defendants' growing crops than may be reasonably necessary, and must keep within fifty feet of the center line and in a roadway on one side or the other thereof, except as may be necessary in passing from the road to the poles or line. In making repairs or renewals reasonable care shall be exercised not to do unnecessary damage to crops grov. ing along and near the line.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff do have and recover its costs herein taxed as follows:

Against the defendant, John Swendig.....\$53.29
Against the defendant, Remigus Grab.....\$40.69
Against the defendant, Anthony Kerr.....\$40.69
Against the defendant, James W. Miller....\$40.69
Dated this 26th day of May, 1921.

F. S. DIETRICH,

Judge.

Endorsed: Filed May 26, 1921. W. D. McREYNOLDS, Clerk. (Title of Court and Cause.)

PETITION FOR APPEAL.

TO THE HONORABLE FRANK S. DIETRICH, DISTRICT JUDGE:

The above named defendants, and each of them, feeling aggrieved by the decree rendered and entered in the above entitled consolidated causes on the 26th day of May, 1921, do hereby appeal from said decree to the Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in the Assignment of Errors filed herewith, and they, and each of them, pray that their appeal be allowed and that citation be issued as provided by law, and that a transcript of the records, proceedings and documents upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit under the rules of such Court in such cases made and provided.

And your petitioners, and each of them, further pray that the proper order relating to the required security to be required of them be made.

J. F. AILSHIE, RAY AGEE,

Attorneys for Defendants. Residence and P. O. Address, Coeur d'Alene, Idaho.

Appeal allowed upon giving bond as required by law for the sum of \$200.00.

Dated this 11th day of August, 1921.
FRANK S. DIETRICH,
Judge.

Endorsed: Filed Aug. 11, 1921. W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

ORDER ALLOWING APPEAL.

ON MOTION of J. F. Ailshie and Ray Agee, solicitors and counsel for defendants, it is hereby ordered that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the decree heretofore filed and entered herein be, and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations, and all other proceedings be forthwith transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit.

IT IS FURTHER ORDERED that the bond on appeal be fixed at the sum of \$200.00.

Dated this 11th day of August, 1921.

FRANK S. DIETRICH,

Judge.

Endorsed: Filed, Aug. 11, 1921. W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

ASSIGNMENT OF ERRORS.

NOW COME the defendants in the above entitled cause and file the Assignment of Errors upon which

they will rely upon their prosecution of the appeal in the above entitled cause, from the decree made by this Honorable Court on the 26th day of May, 1921, as follows:

I.

That the Court erred in holding that plaintiff's complaint herein states causes of action against these defendants, and in over-ruling and denying defendants' motions to dismiss said alleged causes of action.

II.

That the Court erred in holding and decreeing that the permit granted to plaintiff for a right of way across the lands of defendants, and each of them, for the construction and maintenance of an electric power transmission line is a valid and subsisting permit in force and effect since the issuance of patent.

III.

That the Court erred in holding and decreeing that plaintiff is the owner of a right of way and easement for a telephone line upon and across the respective lands of these defendants.

IV.

That the Court erred in holding and decreeing that plaintiff is entitled to maintain a roadway along the power transmission line described in the said decree.

V.

That the Court erred in holding and decreeing that plaintiff is entitled to the use of land within fifty feet of the center of said power line in making repairs and renewals.

VI.

That the Court erred in holding and decreeing that the title of these defendants, and each of them, to the lands described in the decree herein is subject to any rights of plaintiff.

VII.

That the Court erred in holding and decreeing that these defendants must maintain gates for the use of plaintiff.

VIII.

That the Court erred in allowing and granting to plaintiff an injunction enjoining defedants from interfering with plaintiff in its operation and maintenance of said electric power transmission line, telephone line and patrol road over and across their respective lands.

IX

That the evidence introduced upon the trial of the cause is not sufficient to support the decree herein.

X.

That the Court committed error upon the whole record in holding that defendants were not entitled

to the relief asked for in their various answers and in granting relief to plaintiff.

XI.

That the Court erred in refusing to find, hold and decree that the issuance of patents to defendants by the Government was in law and effect a revocation of the prior permit issued by the Secretary of the Interior to plaintiff and that defendants took title freed from any and all burdens resulting from such permits.

JAS. F. AILSHIE, RAY AGEE,

Attorneys for Appellants.
Residence and P. O. Address,
Coeur d'Alene, Idaho.

Endorsed: Filed, Aug. 11, 1921. W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS, THAT WE, John Swendig, James W. Miller, Remigus Grab and Anthong Kerr, as principals, and L. G. Sunkel and D. R. Frost as sureties, of the county of Kootenai, State of Idaho, are held and firmly bound unto the Washington Water Power Company, a Corporation, the above-named plaintiff, in the sum of Two Hundred Dollars lawful money of the United States, to be paid to it and its

successors; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and each of our heirs, executors, administrators, assigns, or successors, by these presents.

Sealed with our seals and dated this 11th day of August, 1921.

WHEREAS, The above-named defendants have obtained an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the decree of the District Court of the United States for the District of Idaho, Northern Division, in the above-entitled cause;

NOW THEREFORE, the condition of this obligation is such that if the above-named defendants shall prosecute their said appeal to effect and answer all costs if they fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and effect.

JOHN SWENDID, JAMES W. MILLER, REMIGIUS GRAB, ANTHONY KERR,

Principals.

L. G. SUNKEL, D. R. FROST,

Sureties.

STATE OF IDAHO,) ss.
County of Kootenai,)

On the 11th day of August, 1921, personally appeared before me, L. G. Sunkel and D. R. Frost, respectively known to me to be the persons described in and duly executed the foregoing instrument as parties thereto, and respectively acknowledged, each for himself, that they executed the same as their free act and deed for the purposes therein set forth.

And the said L. G. Sunkel and D. R. Frost, being respectively by me duly sworn, says, each for himself and not one for the other, that he is a resident and householder of the said County of Kootenai and that he is worth the sum of Two Hundred Dollars over and above his just debts and legal liability and property exempt from execution.

L. G. SUNKEL, D. R. FROST.

(SEAL)

Subscribed and sworn to before me this 11th day of August, A. D. 1921.

M. W. FROST,

(SEAL)

Notary Public.

The within bond is approved both as to sufficiency and form this 18th day of August, 1921.

FRANK S. DIETRICH, District Judge.

Endorsed: Filed Aug. 18, 1921. W. D. McREYNOLDS, Clerk. (Title of Court and Cause.)

CITATION ON APPEAL.

UNITED STATES OF AMERICA,

TO THE WASHINGTON WATER POWER COM-PANY, A CORPORATION, DEFENDANT, and

TO JOHN P. GRAY, ITS ATTORNEY, GREETING:

YOU ARE HEREBY NOTIFIED, that in certain consolidated cases in equity in the United States District Court, in and for the District of Idaho, Northern Division, wherein the Washington Water Power Company, a Corporation, is plaintiff and the abovenamed defendants, and each of them, are defendants, an appeal has been allowed the defendants therein to the United States Circuit Court of Appeals for the Ninth Circuit. You are hereby cited and admonished to be and appear in said Court at the City of San Francisco, State of California, on the 10th day of September, 1921, to show cause, if any there be, why the order and decree appealed from should not be corrected and speedy justice done to the parties in that behalf.

WITNESS The Hon Frank S. Dietrich, United States District Judge for the District of Idaho,

Northern Division, this 11th day of August, 1921. FRANK S. DIETRICH.

United States District Judge for the District of Idaho, Northern Division.

Service accepted August 13, 1921.

JOHN P. GRAY,

Attorney for Plaintiff.

Endorsed: Filed Aug. 18, 1921. W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

PRAECIPE.

TO THE CLERK OF THE ABOVE ENTITLED COURT:

YOU ARE HEREBY DIRECTED to prepare a transcript of the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled action of the following papers on file in your office, to-wit:

- 1. Complaint against John Swendig.
- 2. Paragraph X. of Complaint against James W. Miller.
- 3. Paragraph X. of Complaint against Remigius Grab.
- 4. Paragraph X. of Complaint against Anthony Kerr.
- 5. Answer of John Swendig.
- 6. John Swendig's Motion to Dismiss.
- 7. Order Overruling Motion to Dismiss.
- 8. Statement of Evidence, and Order Settling

and Allowing the Same.

- 9. Decree.
- 10. Petition for Appeal.
- 11. Order Allowing Appeal.
- 12. Assignment of Errors.
- 13. Bond on Appeal.
- 14. Citation on Appeal.
- 15. Minutes of the Court.
- 16. Clerk's Certificate.

YOU ARE HEREBY FURTHER REQUESTED AND DIRECTED to certify to the United States Circuit Court of Appeals for the Ninth Circuit, all exhibits and certified copies of exhibits in said cause, including Defendants' Exhibits 1 to 5, inclusive, and Plaintiff's Exhibits 1 to 14, inclusive.

Dated this 12th day of August, 1921.

JAMES F. AILSHIE, RAY AGEE,

Solicitors and Counsel for Defendants, Residing at Coeur d'Alene, Idaho. Service accepted August 13, 1921.

JOHN P. GRAY,

Attorney for Plaintiff.

Residing at Coeur d'Alene, Idaho.

Endorsed: Filed Aug. 18, 1921.

W. D. McREYNOLDS, Clerk.

RETURN TO RECORD.

And thereupon it is ordered by the Court that the foregoing transcript of the record and proceedings

in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

W. D. McREYNOLDS,

Clerk.

DEFENDANT'S EXHIBIT NO. 1 4—1023

Coeur d' Alene 04017
THE UNITED STATES OF AMERICA,
TO ALL TO WHOM THESE PRESENTS SHALL
COME, GREETINGS:

WHEREAS, a Certificate of the Register of the Land Office at Coeur d'Alene, Idaho, has been deposited in the General Land Office, whereby it appears that full payment has been made by the claimant, James W. Miller, according to the provisions of the Act of Congress of April 24, 1820, entitled "An Act making further provision for the sale of the Public Lands," and the acts supplemental thereto, for the East half of the Northwest quarter and the North half of the Southwest quarter of Section twenty-six in Township forty-seven North of Range three West of the Boise Meridian, Idaho, containing one hundred sixty acres, according to the Official Plat of the Survey of the said Land, returned to the GENERAL LAND OFFICE by the Surveyor-General:

NOW KNOW YE, That the UNITED STATES OF AMERICA, in consideration of the premises, and in conformity with the several Acts of Congress in such case made and provided, HAS GIV-EN AND GRANTED, and by these presents DOES GIVE AND GRANT, unto the said claimant and to the heirs of the said claimant the Tract above described: TO HAVE AND TO HOLD the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging, unto the said claimant and to the heirs and assigns of the said claimant forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws and decisions of courts; and there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States, and all the coal or oil deposits therein or thereunder.

IN TESTIMONY WHEREOF, I, Woodrow Wilson, President of the United States of America, have caused these letters to be made Patent, and the Seal of the General Land Office to be hereunto affixed.

GIVEN under my hand, at the City of Washington, the Twenty-third day of January, in the year

of our Lord one thousand nine hundred and fourteen and the Independence of the United States the one hundred and thirty-eighth.

(SEAL)

By the President,
WOODROW WILSON
By M. P. LeROY,
Secretary,
JOHN O'CONNELL.

Acting Recorder of the General Land Office.

RECORDED: Patent Number 378945.

Endorsed: Filed May 23, 1921. W. D. McREYNOLDS, Clerk.

DEFENDANT'S EXHIBIT NO. 2. 4—1023

Coeur d' Alene 03983

THE UNITED STATES OF AMERICA,
TO ALL TO WHOM THESE PRESENTS SHALL
COME, GREETING:

WHEREAS, a Certificate of the Register of the Land Office at Coeur d'Alene, Idaho, has been deposited in the General Land Office, whereby it appears that full payment has been made by the claimant, John Swendig, according to the provisions of the Act of Congress of April 24, 1820, entitled "An Act making further provision for the sale of Public Lands," and the acts supplemental thereto, for the Northeast quarter of Section

twenty-six in Township forty-seven North of Range three West of the Boise Meridian, Idaho, containing one hundred sixty acres, according to the Official Plat of the Survey of the said Land, returned to the GENERAL LAND OFFICE by the Surveyor-General:

NOW KNOW YE, That the UNITED STATES OF AMERICA, in consideration of the premises, and in conformity with the several Acts of Congress in such case made and provided, HAS GIV-EN AND GRANTED, and by these presents DOES GIVE AND GRANT, unto the said claimant and to the heirs of the said claimant the Tract above described: TO HAVE AND TO HOLD the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging, unto the said claimant and to the heirs and assigns of the said claimant forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts; and there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States, and all the coal or oil deposits therein or thereunder.

IN TESTIMONY WHEREOF, I, Woodrow Wilson, President of the United States of America, have caused these letters to be made Patent, and the Seal of the General Land Office to be hereunto affixed.

GIVEN under my hand, at the City of Washington, the Thirtieth day of October, in the year of our Lord one thousand nine hundred and thirteen and of the Independence of the United States the one hundred and thirty-eighth.

(SEAL)

By the President,
WOODROW WILSON
By M. P. LeROY,
Secretary,
L. Q. C. LAMAR,

Recorder of the General Land Office.

RECORDED: Patent Number 363017.

Endorsed: Filed May 23, 1921. W. D. McREYNOLDS, Clerk.

DEFENDANT'S EXHIBIT NO. 3. 4—1023

Coeur d' Alene 04127

THE UNITED STATES OF AMERICA,
TO ALL TO WHOM THESE PRESENTS SHALL
COME, GREETING:

WHEREAS, a Certificate of the Register of the Land Office at Coeur d'Alene, Idaho, has been deposited in the General Land Office, whereby it appears that full payment has been made by the claimant, Remigus Grab, according to the provisions of the Act of Congress of April 24, 1820, entitled "An Act making further provision for the sale of the Public Lands," and the acts supplemental thereto, for the Northeast quarter of Section twenty-four in Township forty-seven North of Range three West of the Boise Meridian, Idaho, containing one hundred sixty acres, according to the Official Plat of the Survey of the said Land, returned to the GENERAL LAND OFFICE by the Surveyor-General:

NOW KNOW YE, That the UNITED STATES OF AMERICA, in consideration of the premises, and in conformity with the several Acts of Congress in such case made and provided, HAS GIV-EN AND GRANTED, and by these presents DOES GIVE AND GRANT, unto the said claimant and to the heirs of the said claimant the Tract above described: TO HAVE AND TO HOLD the same. together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging, unto the said claimant and to the heirs and assigns of the said claimant forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts; and there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States, and all the coal or oil deposits therein or thereunder.

IN TESTIMONY WHEREOF, I, William H. Taft, President of the United States of America, have caused these letters to be made Patent, and the Seal of the General Land Office to be hereunto affixed.

GIVEN under my hand, at the City of Washington, the twenty-fourth day of September, in the year of our Lord one thousand nine hundred and twelve and of the Independence of the United States the one hundred and thirty-seventh.

(SEAL)

By the President, WILLIAM H. TAFT,

By M. P. LeROY,
Secretary,

H. W. CANFORD,

Recorder of the General Land Office.

RECORDED: Patent Number 293389.

Endorsed: Filed May 23, 1921. W. D. McREYNOLDS, Clerk.

DEFENDANT'S EXHIBIT NO. 4. 4—1003

Coeur d'Alene 07111.

THE UNITED STATES OF AMERICA,
TO ALL TO WHOM THESE PRESENTS SHALL
COME, GREETING:

WHEREAS, a Certificate of the Register of the Land Office at Coeur d'Alene, Idaho, has been deposited in the General Land Office, whereby it appears that, pursuant to the Act of Congress of May 20, 1862, "To Secure Homesteads to Actual Settlers on the Public Domain," and the acts supplemental thereto, the claim of Anthony Kerr has been established and duly consummated, in conformity to law, for the Lot two, the southeast quarter of the northwest quarter, the southwest quarter of the northeast quarter, and the northwest quarter of the southeast quarter of Section nineteen in Township forty-seven north of Range two west of the Boise Meridian, Idaho, containing one hundred fifty-nine and eightynine-hundredths acres, according to the Official Plat of the Survey of the said Land, returned to the GEN-ERAL LAND OFFICE, by the Surveyor-General:

NOW KNOW YE, That there is, therefore, granted by the UNITED STATES unto the said claimant the tract of Land above described; TO HAVE AND TO HOLD the said tract of Land, with the appurtenances thereof unto the said claimant and to the heirs and assigns of the said claimant for-

ever; subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and right to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts; and there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States, and all the coal and oil deposits therein or thereunder.

IN TESTIMONY WHEREOF, I, Woodrow Wilson, President of the United States of America, have caused these letters to be made Patent, and the seal of the General Land Office to be hereunto affixed.

GIVEN under my hand, in the District of Columbia, the Fifteenth day of October, in the year of our Lord One Thousand Nine Hundred and Eighteen, and of the Independence of the United States the one hundred and Forty-third.

(SEAL)

By the President,
WOODROW WILSON,
By M. P. LeROY,
Secretary.
L. C. Q. LAMAR,

Recorder of the General Land Office.

RECORDED: Patent Number 650553.

Endorsed: Filed May 23, 1921. W. D. McREYNOLDS, Clerk. John Swendig, et al., vs.

(Title of Court and Cause.)

CLERK'S CERTIFICATE.

I, W. D. McReynolds, Clerk of the District Court of the United States for the district of Idaho, do hereby certify that the above and foregoing transcript of pages numbered from 1 to 100, inclusive, contains true and correct copies of that portion of the pleadings and proceedings in the above consolidated cause as requested by the praecipe filed herein, and that the same constitute the transcript of the record herein upon appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that the cost of the record herein amounts to the sum of \$118.25, and that the same has been paid by the appellant.

Witness my hand and the seal of said Court, affixed at Boise, Idaho, this 9th day of September, 1921.

(SEAL)

W. D. McREYNOLDS,

Clerk.

Plaintiff's Exhibit No. 14.

Admitted.

No. 3769. United States Circuit Court of Appeals for the Ninth Circuit. Filed Dec. 27, 1921. F. D. Monckton, Clerk.

4-207.

В.

M. E. L.

DEPARTMENT OF THE INTERIOR, GENERAL LAND OFFICE, WASHINGTON, D. C.

September 11, 1912.

I hereby certify that the annexed copy of the Secretary's order dated August 23, 1912, is a true and literal exemplification from the original paper in this office.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[Seal] S. V. PROUDFIT,

Acting Commissioner of the General Land Office.

(Stamp:) 259635

Received GLO. Aug. 24, 1912.
Referred to ______
Assigned to ______
Answered by ______
Aug. 23, 1912.

DEPARTMENT OF THE INTERIOR. WASHINGTON.

The Commissioner of the General Land Office. Sir:

"Regulations concerning Right of Way over Public Lands and Reservations for Canals, Ditches, and Reservoirs and Use of Right of Way for Various Purposes," approved June 6, 1908, embraced (paragraphs 37 to 45, inclusive) regulations under the Act of February 15, 1901 (31 Stat., 790), entitled

"An act relating to rights of way through certain parks, reservations, and other public lands."

This statute authorizes and empowers the Secretary of the Interior, under general regulations to be fixed by him, to permit the use of rights of way through the public lands, forest and other reservations of the United States, and the Yosemite, Sequoia, and General Grant National Parks, California,

"for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes, and for canals, ditches, pipes and pipe-lines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs used to promote irrigation or mining or quarrying, or the manufacture or cutting of timber or lumber, or the supplying of water for domestic, public, or any other beneficial uses to the extent of the ground

occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits or water plants, or electrical or other works permitted hereunder, and not to exceed fifty feet on each side of the marginal limits thereof, or not to exceed fifty feet on each side of the center line of such pipes and pipe-lines, electrical, telegraph, and telephone lines and poles, by any citizen, association, or corporation of the United States, where it is intended by such to exercise the use permitted hereunder or any one or more of the purposes herein named."

The statute expressly provides:

"That any permission given by the Secretary of the Interior under the provisions of this act may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park."

Paragraph 43 of the regulations above referred to contained the following provision:

"The final disposal by the United States of any tract traversed by the permitted right of way is of itself, without further act on the part of the Department, a revocation of the permission so far as it affects that tract."

By letter of May 7 to you, amending said paragraph 43, the provision last above quoted was omitted. Upon further consideration it is deemed advisable to further amend the regulations in this particular.

By the Forest Transfer Act of February 1, 1905, sec. 1 (33 Stat., 628), the administration of the Act of February 15, 1901, so far as it affects forest reservations was transferred to the Department of Agriculture. That Department has never adopted that provision of the former regulations of this Department last above quoted.

In view of the permanent character of the works authorized to be constructed under the Act of February 15, 1901, and the large investment necessary to such construction the statute ought not to be interpreted as giving a precarious tenure except in so far as clearly appears from the words used by Congress. After careful consideration of the matter I am of the opinion that the intent of Congress was to protect the public by retaining in the hands of the Secretary of the Interior full control over water power development through the device of making permits revokable in his discretion. statute authorized, in more generous and comprehensive terms than had been used in any preceding statute, the development of water for domestic and public supply, irrigation, mining, and power, and also the development and transmission of electricity. Its primary purpose was to encourage developunder unquestioned public control. former regulation, which provided that

"the final disposal by the United States of any tract traversed by the premitted right of way is of itself, without further act on the part of the Department, a revocation of the permission so far as it affects that tract," was directly contrary to the purpose of the statute as above interpreted. It discouraged development by making the title of the permittee subject to that of the final patentee of the land occupied under the permit and it abandoned all attempt at public control as soon as the land was finally disposed of.

To effectuate the purpose of the statute it is necessary that a permit once given should be superior to the rights of the subsequent patentee of the land until such time as the permit is duly revoked by the Secretary of the Interior in the exercise of the express authority given by the statute.

The contrary view, which was expressed in the provision of paragraph 43 above quoted, rests on a misleading analogy between these statutory permits and a license not coupled with an interest given by a private land owner to a stranger. But the rule of private real property law under which such a license is revoked by the transfer of the fee simple title has no application to either the legal or the economic data with which Congress was dealing in the legislation, and therefore the intent to enact the said rule should not be imputed to Congress in the absence of clear implication of such intent. It is, of course, unquestionable that it was entirely within the power of Congress to provide a different rule if in its judgment under the circumstances the public welfare required it.

In this connection, attention is called to the provision of the Act of August 30, 1890 (26 Stat. 391), which reads as follows:

"In all patents for lands hereafter taken up under any of the land laws of the United States . . . west of the One Hundredth Meridian, it shall be expressed that there is reserved from the lands in said patent described, a right of way thereon for ditches or canals constructed by the authority of the United States."

It is to be noted that this reservation was required by a statute passed more than eleven years before the statute under which these permits are issued, and that the words of the reservation are not limited to ditches and canals constructed by the United States but are expressly extended to those constructed by "the authority" of the United States. This statute clearly shows that Congress, at a comparatively early date, realized the necessity of providing permanent reservations for ditches and canals. Doubtless the primary purpose in view was to safeguard the future construction of ditches and canals upon lands taken up before the construction should be authorized, by making all public lands thereafter taken up in the arid region subject to a public easement for that purpose whenever the Government should deem it wise to authorize such construction, as has since been done by the Reclamation Act of 1902; but it is clear that Congress realized and meant to provide against acquisition of adverse rights after construction which, though later in time, might otherwise be claimed to be prior in law to the ditch right. I am of the opinion that a ditch or canal constructed under permit issued under the Act of February

15, 1901, is protected by the Act of August 30, 1890, against any adverse claim set up by a subsequent patentee of the land traversed by the canal or ditch, and that this protection will continue at least until the Secretary of the Interior shall revoke the permit which authorized the construction of the canal or ditch. Even after such revocation it is probable that the public right to issue another permit continues and is superior to the rights of the patentee.

As to the numerous other works for which right of way may be permitted under the broad and inclusive terms of the Act of February 15, 1901, I am of the opinion that, in the absence of a regulation to the contrary issued under the broad authority given by the statute, the rights of the permittee continue after the issuance of patents to the lands affected and are superior to the rights of the patentees until such time as the Secretary shall exercise his discretionary power to revoke. It is, however, desirable that this construction of the statute shall be embodied in a regulation which cannot be misunderstood. The regulations are therefore amended as follows:

At the end of paragraph 38 add the following words:

"The final disposal by the United States of any tract traversed by a right of way permitted under the said Act shall not be construed to be a revocation of such permission in whole or in part, but such final disposal shall be deemed and taken to be subject to such right of way until such permission shall have been specifically revoked in accordance with the provisions of said Act."

It is also desirable that such patents should contain on their face a notation of the prior permits and of all easements to which the lands are servient when the patent issues. You will therefore be guided by the following regulation in the issuance of all patents:

In every patent hereafter issued for a tract of land traversed by a right of way approved or permitted (including revocable permits) under any of the right of way laws and not forfeited or revoked before such issuance, such right of way or permit shall be expressly noted on the face of the patent by specific reference to the date when and the statute under which the approval was made or permit issued. Such notation shall be in substantially the following form:

It may be noted that the subject matter of the foregoing amendment is touched upon by two pending bills (S. 6440 and H. R. 19858). The Department has expressed its views (by letter of May 2, 1912, to the Chairman of the Senate Committee on Public Lands) on the Senate Bill. The regulations hereinbefore made will protect permittees

from any demands that might otherwise be made upon them by subsequent claimants of the lands over which the permits give a right of way. The rights of the public, however, are not fully protected because private arrangements between such claimants, after they have obtained patent, and the permittees might give the permittees a perpetual right of way for any of the enumerated works (except a canal or ditch) free of the regulative power intended to be reserved to the Secretary of the Interior by said statute. The public can be safeguarded against this danger by withdrawal under the act of 1910 (36 Stat. 847) of all lands outside of National Forests over which rights of way have hitherto or shall hereafter be permitted under the said statute by permits which remain unrevoked. The statutes relating to National Forests reserve them from appropriation at the will of individuals except under the mineral laws and certain of the right of wav laws. The General Withdrawal Act of 1910 also subjects the withdrawn land to private appropriation under the mining laws except as to coal, oil, gas, and phosphate. Lands within National Forests servient to existing permits under the Act of 1901 are therefore already protected from private appropriation in like manner, though not to like extent, as are those withdrawn under the Act of 1910.

The withdrawals hereby ordered should be limited to the extent necessary to protect the works. In fixing this limit the Department is not restricted to the designation of legal subdivisions or aliquot parts thereof. For example, withdrawal for a transmission line should include only a 100-foot strip.

You are hereby instructed to take up this matter with the Director of the Geological Survey with a view to your recommending jointly with him such withdrawals as are required by this letter.

Very respectfully,
WALTER L. FISHER,
Secretary.
PPW.

Defendant's Exhibit No. 5.

Admitted.

[Endorsed]: #752, Consolidated. U. S. District Court, District of Idaho. Filed May 23, 1921. W. D. McReynolds, Clerk. By —————, Deputy.

No. 3769. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jan. 3, 1922. F. D. Monckton, Clerk.

4-207.

"B"

JAP.

DEPARTMENT OF THE INTERIOR, GENERAL LAND OFFICE, WASHINGTON.

May 5th, 1921.

I hereby certify that the annexed copy of Secretary's Decision, D-46785, dated April 23, 1921, John A. Nye et al. vs. Washington Water Power Co., is a true and literal exemplification from the

press copy of the said decision on file in this office.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and caused the seal of this office to be affixed, at the City of Washington, on the day and year above written.

[Seal]

C. M. BRUCE,

Assistant Commissioner of the General Land Office.

D-4, 6785

April 23, 1921.

JOHN A. NYE et al.

v.

WASHINGTON WATER POWER CO.

(Apr. 28, 1921) Protest—Petition for Revocation of Permit.

Prior decision modified.

Official Copy Not to be Taken from the Record.

MOTIONS FOR REHEARING.

The Department has reconsidered the above-entitled case wherein, upon petition of John A. Nye et al. decision was rendered February 8, 1921, directing that patent to Nye, embracing 146.50 acres be recalled and reissued free from the encumbrance, or restriction, that the land so patented was subject to the right of way for a reservoir granted to the Washington Water Power Company, February 2, 1909, under the act of February 15, 1901 (31 Stat. 790); that the permit granted to said company be revoked to that extent; and that other original homesteaders coming within the purview of the ruling as laid down by said decision of February

8, 1921, be afforded opportunity to make showing that the facts in their cases were similar to those in this proceeding.

Motions for rehearing having been filed by Nye on behalf of himself and others, and also by the Washington Water Power Company, the Department heard the case orally April 18 and 19, 1921. In the light of the record and of the arguments presented by brief and orally, the Department concludes as follows:

7—2 D—46785

The Washington Water Power Company prior to issuance of the permit granted February 2, 1909, constructed and used the main works of its present plant. Thereafter, January 25, 1909, said company applied for a permission, or license, under the act of February 15, 1901, supra, to overflow certain lands in the Coeur d'Alene Indian Reservation, Idaho, to an elevation above sea level of 2128 feet, the overflow being represented as covering 6240.81 acres. Said lands were a part of the surplus Indian lands, the disposition of which had been provided for in the act of June 21, 1906 (34 Stat. 325-355). The permit of the Washington Water Power Company was granted February 2, 1909, upon payment of \$1.25 per acre, for the benefit of the Indians of the Coeur d'Alene reservation.

Regarding the procurement of the permit by the Company, the Department finds nothing in the record to impugn its good faith. As to the company's operations under said permit, it is found that such

operations as were carried on thereunder were in accordance with law and under authority duly granted by this Department. Said permit is in full force and effect and will so remain except in so far as it may be revoked under and by virtue of this decision.

The Department, pursuant to proclamation of the President dated May 22, 1909 (37 L. D. 698), and in conformity with the provisions of the act of June 21, 1906, *supra*, opened all the surplus Indian Lands within the Coeur d'Alene Indian Reservation to entry.

Prior to and at the time the lands were thrown open to entry in May, 1910, the rules and regulations of the Department provided that issuance of a patent upon lands covered by an outstanding permit under the said act of February 15, 1901, revoked the permit. Paragraph 11 of the then governing regulations (31 L. D. 13–17), provided—

Upon receipt of applications for right of way by the General Land Office, the same will be examined and then submitted to the Secretary of the Interior with recommendation as to their approval. Permission to use rights of way through a reservation or any park designated in the act will only be granted upon approval of the chief officer of the Department under whose supervision such park or reservation falls and upon a finding by him that the same is not incompatible with the public interest. If the application, and the showing made in support thereof, is satisfactory, the

Secretary of the Interior will give the required permission in such form as may be deemed proper, according to the features of each case; and it is to be expressly understood, in accordance with the final proviso of the act, that any permission given thereunder may be modified or revoked by the Secretary or his successor, in his discretion, at any time, and shall not be held to confer any right, easement, or interest in, to or over any public land, reservation, or park. The final disposal by the United States of any tract traversed by the permitted right of way is of itself, without further act on the part of the Department, a revocation of the permission so far as it affects that tract, and any permission granted hereunder is also subject to such further and future regulations as may be adopted by the Department.

Settlers, or entrymen, were therefore warranted in believing that when they had complied with the law and patent had issued, the prior permit or license granted would terminate as to the lands so patented. The regulations quoted were in effect until August 24, 1912, when the Department pursuant to instructions issued to the Commissioner of the General Land Office under date of August 23, 1912, revoked the instructions of July 8, 1901 (31 L. D. 13–18). Paragraph 9 of regulations issued August 24, 1912, under the act of February 15, 1901, supra, (41 L. D. 152), still in effect provides—

The final disposal by the United States of any tract traversed by a right of way permitted under this act shall not be construed to be a revocation of such permission in whole or in part, but such final disposal shall be deemed and taken to be subject to such right of way until such permission shall have been specifically revoked in accordance with the provisions of said act. (Secretary to Commissioner of General Land Office, Aug. 23, 1912.)

The record discloses that the Department by decision of July 29, 1910, rescinded and set aside its approval of the permit granted to the Washington Water Power Company, February 2, 1909, which order of revocation was vacated by departmental decision of April 22, 1912, upon motion for rehearing. With knowledge that the permit had been revoked by the order of July 29, 1910, and that the regulations then in effect provided that issuance of patent revoked a permit, the settlers or entrymen had reason to believe that they would ultimately secure clear title, notwithstanding that motion for rehearing of departmental decision of July 29, 1910, had been filed within the time prescribed by the Rules of Practice on behalf of the Washington Water Power Company.

Under the circumstances it is directed that as to all lands embraced in entries made prior to August 24, 1912, and carried to patent, still in the hands of the original entrymen, who have, to date of this decision, continued in ownership of the lands, or in the hands of transferees who acquired title prior to August 24, 1912, permits will be revoked and patents reissued free from the re-

striction upon surrender of the original patents and satisfactory showing in each case that the entrymen, or transferee, comes within this ruling. The prior decision of February 8, 1921, is modified accordingly.

Appropriate instructions will be given to the Commissioner of the General Land Office to carry this decision into effect.

(Signed) ALBERT B. FALL, Secretary. IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JOHN SWENDIG, JAMES W. MIL-LER, REMIGIUS GRAB, AND ANTHONY KERR,

Appellants.

THE WASHINGTON WATER POWER COMPANY, a Corporation.

Appellee.

Brief for Appellants

On Appeal From the United States District Court for the District of Idaho, Northern Division.

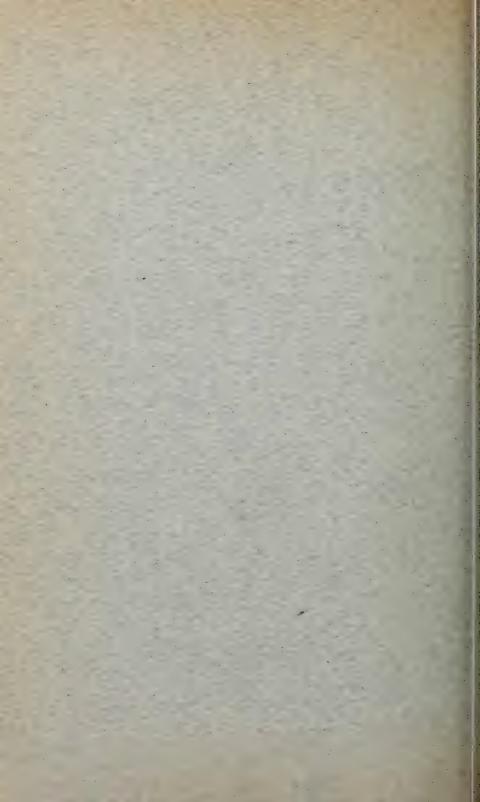
FILED

JAN 30 1922

JAMES F. AILSHIE, RAY AGEE,

F. D. MONCKTON, OLERK.

Coeur d'Alene, Idaho, Solicitors for Appellants.



INDEX AND CASES CITED.

STATEMENT OF CASE.

Pages 5 to 9.

SPECIFICATION OF ERRORS.

Pages 10 to 11.

ARGUMENT.

Page 12.

SPECIFICATION OF ERRORS I TO VI, VII AND IX.

Pages 12 to 31.

Act of February 15, 1901 (31 Statutes at Large 790)

ISSUANCE OF PATENT REVOKES A LICENSE.

Pages 15 to 19.

De Haro vs. United States, 5 Wall. 599 (18 L. E. 681).

18 Am. & Eng. Encyc. of Law, page 1141.

22 Ruling Case Law, page 275, par. 37.

United States vs. Carl Schurz, 12 Otto 378 (26 L. E. 167).

Moore vs. Robbins, 6 Otto 530 (24 L. E. 848).

Iron Silver Mining Company vs. Campbell, 135 U. S. 286 (34 L. E. 155).

Stone vs. United States, 2 Wall. 525 (17 L. E. 765).

RIGHT OF EMINENT DOMAIN REQUIRES PAY-MENT OF JUST COMPENSATION.

Page 20.

Sec. 14, Article I of the Constitution of State of Idaho. Sec. 7404 of the Idaho Compiled Statutes. Hollister vs. State, 9 Idaho 8.

REGULATION OF THE LAND DEPARTMENT AND RIGHTS OF DEFENDANTS THEREUNDER.

Pages 20 to 29.

31 Land Decisions 17.

41 Land Decisions 152.

Witherspoon vs. Duncan, 4 Wall. 210 (18 L. E. 339).

INDEX AND CASES CITED.

Wirth vs. Branson, 98 U.S. 118 (25 L. E. 86).

Cornelius vs. Kessel, 128 U. S. 456 (32 L. E. 482).

Northern Pacific Railway Co. vs. Smith, 171 U. S. 263 (43 L. E. 157).

Johnson vs. Drew, 171 U.S. 94 (43 L. E. 88).

Frisbie vs. Whitney, 76 U.S. 187 (19 L. E. 688).

Gonzales vs. French, 164 U.S. 187 (41 L. E. 458).

Hutchings vs. Low, 82 t. S. 77 (21 L. E. 82).

Steel vs. St. Louis Smelting & Refining Co., 106 U. S. 447 (27 L. E. 226).

Henshaw vs. Bissell, 85 U. S. 255 (21 L. E. 835).

Brant vs. The Virginia Coal & Iron Co., 93 U. S. 326 (23 L. E. 927).

PLAINTIFF'S TELEPHONE LINE.

Pages 29 to 31.

Act of March 3, 1901 (31 Statutes at Large 1083).

SPECIFICATION OF ERROR NO. VII.

Pages 31 to 32.

OPINION IN WASHINGTON WATER POWER COMPANY vs. HARBAUGH.

Pages 32 to 35.

Washington Water Power Co. vs. Harbaugh, 253 Fed. 681.

31 Statutes at Large 790.

 $IN\ THE$

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JOHN SWENDIG, JAMES W. MIL-LER, REMIGIUS GRAB, AND ANTHONY KERR,

-VS--

Appellants.

THE WASHINGTON WATER POWER COMPANY, a Corporation.

Appellee.

Brief for Appellants

On Appeal From the United States District Court for the District of Idaho, Northern Division.

JAMES F. AILSHIE, RAY AGEE,

Coeur d'Alene, Idaho, Solicitors for Appellants.



United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JOHN SWENDIG, JAMES W. MIL-LER, REMIGIUS GRAB, AND ANTHONY KERR,

__VS__

Appellants.

THE WASHINGTON WATER POWER COMPANY, a Corporation.

Appellee.

Brief for Appellants

On Appeal From the United States District Court for the District of Idaho, Northern Division.

STATEMENT OF CASE.

(Note: For convenience we will refer to appellants as defendants and to appellee as plaintiff. Italics herein are ours unless otherwise designated.)

There is no dispute as to the facts of this case. Prior to April 15, 1902, plaintiff filed an application with the

Department of the Interior for authority to construct a telephone line through and across the Coeur d'Alene Indian Reservation in the State of Idaho, which authority was granted by the Secretary on April 15, 1902, and crossed, among other lands, those of the defendants hereinafter described. This application was made and the authority granted pursuant to the Act of Congress, approved March 3, 1901. (31 Statutes at Large 1983). (Tr. 11,-12).

Prior to July 7, 1902, plaintiff filed an application, with the Department of the Interior, for a permit and permission to construct and maintain an Electric Power and Transmission line over said Reservation, which permit was granted by the Secretary on July 7, 1902, and crossed, among other lands, the lands now belonging to defendants. This application was made and permit granted under authority of the Act of Congress, approved February 15, 1901 (31 Statutes at Large 790). (Tr. 13).

Under the above mentioned authority from the Secretary of the Interior and during the year 1903, plaintiff constructed an electric power transmission line over and across said Reservation and the lands of defendants. About the same time plaintiff also constructed a telephone line across the Reservation, which latter line simply consisted of wires placed upon the poles of the power transmission line, and since that time plaintiff has continually maintained and operated both lines and

also a patrol road along the same. (Tr. 14-15). Although the telephone line has been constructed since 1903, it has never been used by anyone or for any purpose except by plaintiff in connection with and as an accessory to the Power Transmission line, and the same was constructed only for that purpose.

Subsequent to June 21, 1906, the Coeur d'Alene Indian Reservation was thrown open to settlement. On or about May 2, 1910, and after the opening of the Reservation defendant John Swendig, made a homestead filing upon the land described as the Northeast Quarter of Section 26; Township 47 North; Range 3 West of Boise Meridian, Idaho, and thereafter made final proof and on the 13th day of October, 1913, received a patent from the United States for such land. (Tr. 17). On or about the 7th day of May, 1910, defendant, Remigius Grab made a homestead filing upon the land described as the Northeast Quarter of Section 24; Township 47 North; Range 3 West of Boise Meridian, Idaho, and thereafter made final proof and on the 24th day of September, 1912 received a patent from the United States to said land. (Tr. 25). On or about the 4th day of May, 1910, defendant, James W. Miller, made a homestead filing upon the land described as the North Half of the Southwest quarter and the East Half of the Northwest quarter of Section 26; Township 47 North; Range 3 West of Boise Meridian, Idaho, and thereafter made final proof and on

the 23rd day of January, 1914, received a patent from the United States to the above described land. (Tr. 24). On or about the 22nd day of December, 1910, defendant, Anthony Kerr, made a homestead filing upon the land described as Lot 2, and the Southeast quarter of the Northwest quarter and the Southwest quarter of the Northeast quarter and the Northwest quarter of the Southeast quarter of Section 19; Township 47 North; Range 2 West of Boise Meridian, Idaho, and thereafter made final proof and on the 15th day of October, 1918, received a patent from the United States for this land. (Tr. 26).

Each patent to the above-described land is absolute on its face and makes no reservation, whatever, of plaintiff's pretended right of way, and under these absolute conveyances each defendant has at all times objected to the use of said right of way across his land on the ground that plaintiff has no permit or right to operate and maintain said lines thereacross.

Plaintiff brought separate action against each defendant for the purpose of securing an injunction and prays the court as follows:

"That this court may issue its injunction perpetually enjoining and restraining the said defendant and all persons acting under his authority or pretending so to act, and all successors in interest of said defendant, from interfering with this plaintiff in operating and maintaining the said Electric Power Transmission line and said Telephone line and said patrol road over and across", the respect-

ive land of each defendant, "and from passing along and over the said patrol road".

The defendants each filed their motions in the trial court to dismiss the actions, on the ground that the complaint fails to state facts sufficient to constitute a cause of action. (Tr. 50). These motions were overruled by the trial court (Tr. 52), and the decision of the court was based upon the case of Washington Water Power Co. v. Harbaugh (253 Fed. 681),—a previous decision of the same court. The case went to trial, and documentary evidence and oral testimony was introduced, and the court thereupon entered a decree in favor of plaintiff as prayed for, and "perpetually enjoined and restrained (defendants) from interfering with the plaintiff in the operation and maintenance of the said electric power line", etc. (Tr. 75-80). Defendants thereupon prosecuted this appeal from the judgment.

SPECIFICATION OF ERRORS.

Defendants specify and assign the following errors:

T.

That the Court erred in holding that plaintiff's complaint states causes of action against each of these defendants, and in over-ruling and denying defendants' motion to dismiss said alleged causes of action.

II.

That the Court erred in holding and decreeing that the permit granted to plaintiff for a right of way across the lands of defendants, and each of them, for the construction and maintenance of an electric power transmission line is a valid and subsisting permit in force and effect since the issuance of patent.

III.

That the Court erred in holding and decreeing that plaintiff is entitled to maintain a roadway along the power transmission line described in the said decree.

IV.

That the Court erred in holding and decreeing that the title of these defendants, and each of them, to the lands described in the decree herein is subject to any rights of plaintiff.

V.

That the Court erred in holding and decreeing that these defendants must maintain gates for the use of plaintiff.

VI.

That the Court erred in holding and decreeing that plaintiff is the owner of a right of way and easement for a telephone line upon and across the respective lands of these defendants.

VII.

That the Court erred in admitting in evidence plaintiff's exhibit 14 and in considering and giving weight to the same for purpose of qualifying and varying the terms of the patents issued to defendants.

VIII.

That the Court committed error upon the whole record in holding that defendants were not entitled to the relief asked for in their various answers and in granting relief to plaintiffs.

IX.

That the Court erred in refusing to find, hold and decree that the issuance of patents to defendants by the Government was in law and effect a revocation of the prior permit issued by the Secretary of the Interior to plaintiff and that defendants took title freed from any and all burdens resulting from such permits.

ARGUMENT.

Specification of Errors.

I to VI, VIII and IX.

The foregoing specifications of error are so closely related, and all involving, as they do, the construction of the statute and defendants' patents, that we deem it best to consider and discuss them all together.

The language used in the Act of Congress of February 15, 1901, under which plaintiff received a permit to operate and maintain its Electric Power Transmission line, is unambiguous and too clear to admit of but one construction. It clearly states that the Secretary of Interior cannot grant, and a grantee cannot acquire, any interest whatever in the land across which the grantee acquires permission to maintain and operate electric power and transmission lines.

The statute involved reads in part as follows:

"That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the public lands * * * for electrical plants, poles, and lines for the generation and distribution of electrical power * * * to the extent of the ground occupied by such * * * * electrical or other works permitted hereunder * * * And provided further, that any permission given by the Secretary of the Interior under the provisions of this Act may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement or interest in, to or over any public land, reservation, or park". (31 Stat. at L. 790).

As the grantce acquired no "right, or easement, or interest in, to or over" the land in question, and still had a right, under the permit granted by the Secretary of the Interior, to operate and maintain an Electric Power and Transmission line across the Coeur d'Alene Indian Reservation, then the permit, revocable at the optionand in the discretion of the Secretary of the Interior, could be nothing greater than a mere revocable license. And furthermore, the plaintiff does not claim that it has any easement over the land in question, but does claim that it has the right to operate and maintain said lines under the permit heretofore meritioned, under the authority of the Land Department of the United States. In other words, the plaintiff claims that the permit, granted to it by the Secretary of the Interior, to operate and maintain its transmission line across the Coeur d'Alene Indian Reservation, is still existing and operative and that the authority gives it a right to continue to operate and maintain this transmission line over defendants' lands.

Now, as the plaintiff never had anything more than a mere revocable license to operate and maintain this line across the Coeur d'Alene Indian Reservation, its present rights must be construed and must depend upon the same construction as the rights of any other individual operating under a revocable license and its rights may be extinguished in the same manner and under the same condition as those of a licensee under a private individual. The plaintiff does not maintain, nor could it

successfully maintain, that the United States could not have revoked its permit at any time. The Land Department specifically reserved the right to cut off plaintiff's permit or license at its option.

Hence if the United States could revoke this permit or license at its option, then clearly any act on the part of the United States, which shows an intent to revoke such permit, or which is inconsistent with the continued existence thereof, must ipso facto revoke plaintiff's license to operate and maintain its transmission line.

There is, therefore, one decisive question involved in this case, and that is: Does the subsequent conveyance of land by the United States by a patent absolute on its face, ipso facto, revoke a permit issued by the Secretary of the Interior, under the authority of the Act of Feb. 15, 1901, for the construction of a Power Transmission line over such land at a time when it was in an Indian Reservation?

It has been admitted by all concerned thus far in the case that any permit issued under the Act of February 15, 1901, is a mere revocable license.

ISSUANCE OF A PATENT REVOKES A LICENSE.

It is an elementary principal of law that in order for a license to exist, the licensor must have some right to or interest in the thing upon which the license is to operate and that when such right or interest of the licensor is extinguihed, so also is the license extinguished. It is uniformly held that an absolute conveyance of land, ipso facto, revokes any license to the use thereof.

In the case of De Plaro v. U. S., 5 Wall. 599, (18 L. E. 681) the Supreme Court of the United States lays down the rule in the following language:

"There is a clear distinction between the effect of a license to enter land, uncoupled with an interest, and a grant. A grant passes some estate of greater or less degree, must be in writing, and is irrevocable, unless it contains words of revocation; whereas a license is a personal privilege, can be conferred by parol or in writing, conveys no estate or interest, and is revocable at the pleasure of the party making it. There are also other incidents attaching to a license. It is an authority to do a lawful act, which, without it, would be unlawful, and while it remains unrevoked is a justification for the acts which it authorizes to be done. It ceases with the death of either party and cannot be transferred or alienated by the licensee, because it is a personal matter, and is limited to the original parties to it. .1 sale of the lands by the owner instantly works its revocation, and in no sense is it property descendible to heirs. These are familiar and well established principles of law, hardly requiring a citation of author ities for their vindication; but if they are needed, they will be found collected in the notes to 2d Hare & Wallace's American Leading Cases, commencing on page 376. We are not aware of any difference between the civil and common law on this subject."

The author of the text in 18 Am. & Eng. Encyc. of Law, at page 1141 states the rule as follows:

"As a license is terminated by any act of the licensor which shows an intention to revoke it, a conveyance by the licensor of some interest in the land inconsistent with the continued enjoyment of the license operates as a revocation even if the license was granted upon a consideration."

A great many authorities could be cited upon this question, all holding as the above, but as was said in the De Haro case, "These are familiar and well established principles of law, hardly requiring a citation of authorities for their vindication."

IT IS ALSO ESTABLISHED BY AN UNBROKEN LINE OF AUTHORITIES THAT WHEN A PATENT, ABSOLUTE UPON ITS FACE, HAS BEEN ISSUED BY THE LAND DEPARTMENT AND DELIVERED AND ACCEPTED BY THE PATENTEE, THE TITLE OF THE UNITED STATES GOES WITH IT AND ALL RIGHT TO CONTROL THE TITLE OR LAND OR TO DECIDE ON THE RIGHT TO THE TITLE HAS PASSED FROM THE LAND OFFICE AND FROM THE EXECUTIVE DEPARTMENT OF THE GOVERNMENT.

22 R. C. L., page 275, Par. 37.

United States v. Carl Schurz, 12 Otto, 378; 26 U. S. (L. E.) 167.

Moore v. Robbins, 6 Otto 530; 24 U. S. (L. E.) 848.

Iron Silver Mining Company v. Campbell, 135 U. S. 286; 34 U. S. (L. E.) 155.

Stone v. United States, 2 Wall. 525; 17 U. S. (L. E.) 765.

In United States v. Schurz (Supra) the court says:

'From the very nature of the functions performed by these officers (speaking of the officers of

the Land Department) and from the fact that a transfer of the title from the United States to another owner follows their favorable action, it must result that at some stage or other of the proceedings their

authority in the matter ceases.

"It is equally clear that this period is, at the latest, precisely when the last act in the series essential to the transfer of the title has been performed. Whenever this takes place, the land has ceased to be the land of the Government; or, to speak in technical language, the legal title has passed from the Government and the power of these officers to deal with it has also passed away."

In Moore v. Robbins, (supra) the court says:

"While conceding for the present, to the fullest extent, that when there is a question of contested right between private parties to receive from the United States a patent for any part of the public land, it belongs to the head of the Land Department to decide that question, it is equally clear that when the patent has been awarded to one of the contestants and has been issued, delivered and accepted, all right to control the title or to decide on the right to the title has passed from the Land Office. Not only has it passed from the Land Office, but it has passed from the Executive Department of the Government. A moment's consideration will show that this must, in the nature of things, be so. We are speaking now of a case in which the officers of the Department have acted within the scope of their authority. The offices of register and receiver and commissioner are created mainly for the purpose of supervising the sales of the puble lands; and it is a part of their daily business to decide when a party has by purchase, by pre-emption or by any other recognized mode, established a right to receive from the government a title to any part of the public domain. This decision is subject to an appeal to the secretary, if taken in time. But if no such appeal be taken, and the patent issued under the seal of the United States, and signed by the President, is delivered to and accepted by the party, the title of the government passes with this delivery. With the title passes away all authority or control of the Executive Department over the land, and over the title which it has conveyed. * * * But in all this there is no place for the further control of the Executive Department over the title. The functions of that department necessarily cease when the title has passed from the government. And the title does so pass in every instance, where, under the decisions of the officers having authority in the matter, a conveyance, generally called a patent, has been signed by the President, sealed and delivered to and accepted by the grantee".

Then, under the established principles of the law, as shown by the above authorities, at the time that the Land Department issued the patents to these defendants, it conveyed all the interest of the United States, and all the right of the Executive Department of the government to exercise any control or authority over the title or land passed by these grants. There are, therefore, two reasons why the plaintiff's right to maintain and operate its electric power transmission line over the lands in question was necessarily extinguished:

First, the conveyance of an absolute title to defendants clearly showed an intent on the part of the Land Department to revoke this permit or license, and we think did revoke said permit or license, and second, even if the Land Department did not intend to so extinguish the rights of plaintiff, it placed all control and authority over the lands now belonging to defendants out of its power when the patents were granted, and the Executive Department of the government has no interest in the land whatever, there is nothing belonging to the government upon which a license or permit by the Land Department can operate, and the law makes no provision for the operation of a license when the licensor has no interest upon which the license can operate.

It seems self-evident that the grants of the government to defendants had the legal effect of either revoking the permit of plaintiff, or else transferred to defendants the right to revoke it. Certainly the United States as grantor reserved no right or power to either revoke the permit as to these lands or to further regulate or control it over these tracts of land. If the Government cannot revoke it, and the defendants cannot revoke it, then it must have by some process become a vested right, and plaintiff has secured a perpetual right to operate and maintain its lines across a great many miles of land, similarly situated to that of these defendants for nothing, and now alleges that its permanent right under the permit is worth \$25,000.00. (Tr. 14).

RIGHT OF EMINENT DOMAIN REQUIRES PAY-MENT OF JUST COMPENSATION.

The construction by plaintiff of its transmission line at large expense, with the knowledge that it was doing so under a *license* and that it had no easement therefor, gives it no legal right now to assert in court that its license should be made permanent by judicial decree; neither does the revocation of its license by the issuance of patent impair any vested right or destroy any of its property or invested capital.

By the provisions of Sec. 14, Art. I of the Constitution of Idaho, and Sec. 7404 Idaho Compiled Statutes, Subdiv. 6; and Hollister v. State, 9 Ida. 8, and other cases, plaintiff has the *right of eminent domain*.

It is perfectly clear that if the contention of the defendants is correct it will be necessary for plaintiff to at once purchase an easement or else condemn it in accordance with the statutes of Idaho and pay "just compensation" for its right of way. Of course it is self-evident that the thing plaintiff is trying to avoid is the payment of "just compensation" for the casement it seeks to perpetually enjoy.

REGULATION OF THE LAND DEPARTMENT AND RIGHTS OF DEFENDANTS THEREUNDER.

Prior to and at the time these lands were thrown open to entry in May, 1910, the rules and regulations of the Land Department provided that the issuance of a patent to lands covered by an outstanding permit under this statute revoked the permit. Paragraph 11 of the then governing regulations (31 L. D. 17) provided inter alia:

"The final disposal by the United States of any tract traversed by the permitted right of way is of itself, without further act on the part of the Department, a revocation of the permission so far as it affects that tract, and any permission granted hereunder is also subject to such further and future regulations as may be adopted by the Department."

The foregoing provision was in effect until the 24th day of August, 1912, when it was supplanted by a regulation providing that the subsequent conveyance of the land should not revoke the permits outstanding under this statute. Paragraph 9 of the regulations issued Aug. ust, 24, 1912 (41 L. D. 152) is as follows:

"The final disposal by the United States of any tract traversed by a right of way permitted under this act shall not be construed to be a revocation of such permission in whole or in part, but such final disposal shall be deemed and taken to be subject to such right of way until such permission shall have been specifically revoked in accordance with the provisions of said act. (Secretary to Commissioner of General Land Office, Aug. 23, 1912)."

The foregoing provisions establish the fact that at the time the Coeur d'Alene Indian Reservation was thrown open to settlement, the regulations of the Land Department provided that a patent issued to a settler would revoke any permit outstanding on the land under this statute. This regulation was in effect at the time each of these defendants made homestead entry upon their respective lands (Tr. 17, 24, 25, 26). It was also in effect when Grab made final proof June 24, 1912 (Tr. 24). The Land Department changed these regulations in August, 1912, but even if the Land Department did have authority or power to change the construction of this statute, which we urge it did not, it could not do so in any manner to affect the rights of these defendants which were initiated and date from the time of their entry of the land in 1910, when the regulation for cancellation was in effect.

ENTRY BY A SETTLER UPON PUBLIC LAND AND THE RECEIPT OF A CERTIFICATE OF ENTRY FROM THE LAND DEPARTMENT INSTANTLY SEGREGATES SUCH LAND FROM THE PUBLIC DOMAIN AND WHEN PATENT SUBSEQUENTLY ISSUES IT TAKES EFFECT AS OF THE DATE OF SUCH ENTRY.

In the case of Witherspoon v. Duncan, 4 Wall. 210 (18 L. E. 339), the Supreme Court of the United States used the following language:

"In no just sense can lands be said to be public lands after they have been entered at the land office and a certificate of entry obtained. If public lands before the entry, after it they are private property. If subject to sale, the government has no power to revoke the entry and withhold the patent. A second sale, if the first was authorized by law, confers no right on the buyer, and is a void act.

"According to the well-known mode of proceeding at the land offices (established for the mutual convenience of buyer and seller), if the party is entitled by law to enter the land, the receiver gives him a certificate of entry reciting the facts, by means of

which, in due time, he receives a patent. The contract of purchase is complete when the certificate of entry is executed and delivered, and thereafter the land ceases to be a part of the public domain".

To the same effect see:

Wirth v. Branson, 98 U. S. 118, 25 L. E. 86; Cornelius v. Kissell, 128 U. S. 456, 32 L. E. 482.

Clearly under the foregoing authorities, even if the Land Department had the power or authority to misin-interpret the Act of Congress and make such regulations, they would in nowise affect the previously initiated rights of these defendants. Their rights were established in 1910 when they made entry on this land. Any act subsequent thereto tending to change or alter such rights would be in excess of jurisdiction and void. It would be depriving these defendants of their property without due process of law. Under the regulation in effect at the date of their entry upon this land, defendants had a right to believe that the subsequent issuance of patents to them would revoke the permit of plaintiff and would give defendants title to all the land which they had purchased free from any burden of plaintiff's power line.

This identical question came up before the Land Department in a case wherein plaintiff here was also a party. The case is entitled John A. Nye et al. v. Washington Water Power Co., and the opinion (Defendants' Ex. 5) was written by the present Secretary, Hon. Albert B. Fall. In this opinion the Secretary, after quoting the regulation in effect in 1910, used the following language:

"Settlers, or entrymen, were therefore warranted in believing that when they had complied with the law and patent had issued, the prior permit or license granted would terminate as to the lands so patented."

With such regulation in effect when these defendants made their respective homestead entries, and paid for this land, it would violate every principle of equity and justice to permit the regulation, dated August 24, 1912, to be effective as against them if it should be conceded that the Department had the authority to promulgate such a rule. They are the purchasers of this land and as Secretary Fall said,

"were therefore warranted in believing that when they had complied with the law and patent had issued, the prior permit or license granted would terminate as to the lands so patented."

This regulation of 1912, if effective, would deprive them of part of that which they had purchased, which would not seem to be either justice or law.

On first blush it might seem that to hold that the subsequent conveyance of these lands to defendants revoked plaintiff's permit would work a hardship upon plaintiff in view of the fact that it has expended quite an amount of money in constructing this power line. However, even if such revocation would work a hardship upon plaintiff we fail to see how that would give plaintiff any right as against these defendants, who are bona fide purchasers of this land from the United States.

MERE OCCUPATION AND IMPROVEMENT ON PUBLIC LAND DOES NOT CONFER A VESTED RIGHT IN THE LAND SO OCCUPIED, NO MATTER HOW LONG THE OCCUPATION NOR HOW LARGE THE IMPROVEMENTS, SO THAT THE OCCUPANT CAN MAINTAIN A RIGHT OF POSSESSION AGAINST THE UNITED STATES OR THE GRANTEE OF THE UNITED STATES

In the case of Northern Pacific Railway Co. v. Smith, 171 U. S. 260; 43 L. E. 157, the Supreme Court of the United States had under consideration a question arising out of a settlement upon public land with the view of locating a townsite thereon. The party had already built houses on the particular property, but had made no application to the Land Department. Later the land in question was granted to defendant railroad company. The court in deciding that case used the following language:

"It has frequently been decided by this court that mere occupation and improvement on the public lands, with a view to pre-emption, do not confer a rested right in the land so occupied; that the power of Congress over the public lands, as conferred by the constitution, can only be restrained by the courts in cases where the land has ceased to be government property by reason of a right vested in some person or corporation, that such a vested right, under the pre-emption laws, is only obtained when the purchase money has been paid, and the receipt of the proper land officer given to the purchasers. If then, one seeking to appropriate to himself a portion of the public lands cannot, no matter how long his occupation or how large his improvements, maintain a right of possession against the United States or their grantees, unless he has by entry and payment of purchase money, ereated in himself a rested right, is one who claims under a town-site grant in any better position?"

In the case of Johnson v. Drew, 171 U. S. 94; 43 L. E. 88, the Supreme Court of the United States said:

"It being so a part of the public domain, subject to the administration by the Land Department and to disposal in the ordinary way, the question arises whether a party can defend against a patent duly issued therefor upon an entry made in the local land office on the ground that he was in actual possession of the land at the time of the issue of the patent? We are of the opinion that he cannot. It appears from the testimony that the defendant, although in occupation of this land, as he says, from 1871, never attempted to make any entry in the local land office, never took any steps to secure a title, and in fact did nothing until after the issue of a patent, when he began to make inquiry as to his supposed rights."

To the same effect see:

Frisbie v. Whitney, 76 U. S. 187; 19 L. E. 668. Gonzales v. French, 164 U. S. 339; 41 L. E. 458. Hutchings v. Low, 82 U. S. 77; 21 L. E. 82. Steel v. St. Louis Smelting & Refin. Co., 106 U. S. 447; 27 L. E. 226.

In the present case plaintiff does not claim any vested right in this land by means of any grant or conveyance, and there is no showing that it ever attempted to or took any steps to acquire title to or an easement for this right of way, although it had notice that defendants were purchasing it, and under the above authorities, it is clear that plaintiff's mere occupancy and construction of its power line across this land did not give it any right against the United States and does not give it any right against these defendants, who are bona fide purchasers from the United States. And certainly this is not a situation wherein plaintiff could claim any right on the ground of estoppel, because it had spent money on this right of way.

THE PRINCIPLE THAT ONE SHOULD BE ESTOPPED FROM ASSERTING A RIGHT TO PROPERTY UPON WHICH HE HAS, BY HIS CONDUCT, MISLED ANOTHER CANNOT BE INVOKED AGAINST THE UNITED STATES, OR BY ONE WHO, AT THE TIME THE IMPROVEMENTS WERE MADE, WAS ACQUAINTED WITH THE TRUE CHARACTER OF HIS TITLE OR WITH THE FACT THAT HE HAD NONE.

In the case of Steel v. St. Louis Smelting & Refining Co., 106 U. S. 447; 27 L. E. 226, the Supreme Court had under consideration a state of facts wherein plaintiff had acquired a mineral patent to lands claimed by defendant under a conveyance as part of a town site on the pub. lic domain. Plaintiff set up its title and defendant alledged the foregoing fact showing that the land had been occupied as a townsite for more than nineteen years prior to the patent of plaintiff; that the plaintiff's assignor had lived in the town for nineteen years and was cognizant of the fact that large amounts of money had been expended by defendant and was being expended by defendant, amounting to over \$5,000.00, and had never made any objection thereto nor informed defendant of his rights. Demurrer to this answer was sustained by the lower court and in considering the question, the Supreme Court said:

"These allegations are very far from establishing such an equity in the defendants as to estop the

patentee and those claiming under him, from asserting the legal title to the premises. These matters could not operate to estop the government in any disposition of the land it might choose to make. Its power of alienation could not be affected until the defendants had performed all the acts required by law to acquire a rested interest in the land, and it is not pretended that they took any steps to secure such an interest. Whatever right, therefore, the government possessed, to use or dispose of the property, freed from any claim of the defendants, it could

pass on to its grantee.

"The principle invoked is, that one should be estopped from asserting a right to property upon which he has, by his conduct, misled another, who supposed himself to be the owner, to make expenditures. It is often applied where one owning an estate, stands by and sees another erect improvements on it, in the belief that he has the title or an interest in it, and does not interfere to prevent the work, or inform the party of his own title. There is in such conduct a manifest intention to deceive, or such gross negligence as to amount to constructive fraud. The owner, therefore, in such a case, will not be permitted afterwards to assert his title and recover the property, at least without making compensation for the improvements. But this salutary principle cannot be invoked by one who, at the time the improvements were made, was acquainted with the true character of his own title or with the fact that he had none".

See also:

Henshaw v. Bissell, 85 U. S. 255; 21 L. E. 835. Brant v. The Virginia Coal & Iron Co., 93 U. S. 326; 23 L. E. 927.

In this case there is not a scintilla of showing that would even tend to establish estoppel. Plaintiff knew at the time it was constructing its line over this land that it did not have any interest therein and it further knew that

a subsequent patent to such land would cut off the permit under which it was operating. With knowledge of these facts it went ahead and built its line.

However, as heretofore observed, to hold that plaintiff now has no right to operate and maintain its power line across defendants' lands will not work a hardship on plaintiff but will only compel it to pay "just compensation" for this privilege. The evidence shows that plaintiff only paid the sum of \$224.00 for the right to construct and maintain its telephone line across the entire Coeur d'Alene Indian Reservation (Tr. 12) and that it did not pay a single cent for the permit for its power line right of way privileges which it now claims to be worth more than \$30,000.00. (Tr. 14-15). Plaintiff has been using this right of way since 1903, a period of time extending over more than eighteen years and has not paid a single cent in excess of the \$224.00 for this privilege. (Tr.14-15). Is it either equitable or just that plaintiff should enjoy these great privileges without paying for them? The answer is obvious.

PLAINTIFF'S TELEPHONE LINE.

What has been said relative to plaintiff's power transmission line applies with equal force to its telephone line. While plaintiff claims the right to operate and maintain this telephone line pursuant to a permit or grant under the provisions of the Act of March 3, 1901, (31 Stat. at Large 1083), an examination of this act clear-

ly shows that plaintiff could not acquire the right asserted here under said act and that the Secretary of the Interior was without jurisdiction or authority to issue or grant such right in view of the facts that existed. In the first place, it is conceded that this application was made and the telephone line constructed and is maintained for plaintiff's use only, and that the same is in no sense maintained for the benefit of the public at large and is used only as an accessory or incident to plaintiff's power transmission line. The Act of March 3, 1901 (31 Stat. at Large 1083) applies only to telephone lines operated for the use and benefit of the public at large, where the company operating the same is doing so as a business and charges tolls and not for its own private use as an accessory to some other business. This is shown from the wording of the Statute itself. The portion of the statute pertineut reads as follows:

"The Secreary of the interior is hereby authorized and empowered to grant a right of way, in the nature of an easement, for the construction, operation, and maintenance of telephone and telegraph lines and offices for general telephone and telegraph business through any Indian Reservation * * * and Congress hereby expressly reserves the right to regulate the tolls or charges for the transmission of messages over any lines constructed under the provisions of this Act."

The above quoted language is so clear as to the purpose of the law that further discussion seems unnecessary. In view of the foregoing provisions of the act it seems clear that the plaintiff could not and did not acquire any right under the Act of March 3, 1901 (31 St. at Large 1083)

and that the so-called grant for a right of way for a telephone line was wholly ineffective and void.

It would appear, therefore, that if plaintiff is authorized to operate and maintain this telephone line at all, it must do so under the permit granted pursuant to the Act of February 15, 1901 for its right of way for the power transmission line and as an accessory to such transmission line, and the right of way for the telephone line must stand or fall with the permit for the power transmission line.

SPECIFICATION OF ERROR NO. VII.

This assignment of error is made in order to call the attention of the court to the character of evidence relied on by the trial court in holding defendants' patent subject to the permit granted plaintiff. This was a letter written by the Secretary of the Interior to the Commissioner of the Land Office, dated August 23, 1912 (Tr. 69). We objected to this evidence and we think the objection well taken. The use of this evidence by the plaintiff to assail defendants' title is a collateral attack upon the patent. As will be seen in the discussion hereinafter of the Harbaugh case, the trial court placed great reliance and stress on this particular letter and allowed it to carry more weight than defendants' patent when it came to determining whether defendant took title encumbered with this right of way.

It is only necessary to mention the fact to this court

that in a controversy between two litigants, who each claim to have acquired rights from the government, neither one can set up or assert any mistake, inadvertence or private regulations or understanding by or on the part of the Government in making the grant. Such question can only be raised on a direct attack by the Government.

OPINION IN WASHINGTON WATER POWER COM-PANY V. HARBAUGH, 253 FED. 681, UNSOUND, AND IN EFFECT A REFORMATION OF PATENT ON A COLLATERAL ATTACK.

So far as we have been able to discover, the U. S. District Court for the District of Idaho is the only court that has ever passed directly on the question before this court in the present case. In the Harbaugh case above cited, the trial judge filed an opinion which has been reported and was followed by the same court in this case. It is apparent, we think, that the opinion in the reported case is founded on erroneous assumptions of both law and fact.

In the first place, the court is forced to admit that,

"the right acquired for the maintenance of a power line was in the nature only of a permit or license revocable at the will of the Secretary of the Interior."

It certainly could not be more in the face of the command of Congress,

[&]quot;* * * any permit given by the Secretary of the

Interior under the provision of this Act * * * shall not be held to confer any right, or easement or interest in, to or over any public land, reservation or park * * * .'' (31 St. at Large, 790).

The court then proceeded, however, to discuss and treat this "revocable license" as something "superior to the rights of the subsequent patentee of the land," and quoted from a letter of an administrative officers who refers to the interest acquired by such a license as "the title of the permittee". The quotation adopted by the court from the letter of the Secretary of the Interior says inter alia:

"The rule of private real property law under which such a license is revoked by the transfer of the fee-simple title has no application to either the legal or the economic data with which Congress was dealing in this legislation, and therefore the intent to enact the said rule should not be imputed to Congress in the absence of clear implication of such intent."

Now we ask: What could be a more "clear implication of such intent" than the following plain, straightforward English with which the Act closes?

"And provided further, that any permission given by the Secretary * * * shall not be held to confer any right, or easement or interest in, to or over any public land, reservation or park".

The court then proceeded to characterize the Congressional Act as "a doubtful statute" and thereupon calls to his aid the letter of the Secretary as a "practical construction * * * by a high administrative officer", and con-

cludes that the unqualified fee simple patent from the Government "did not revoke the plaintiff's license".

The opinion then assumes, without any basis therefor, that it had been the intention of the Department to note a reservation of this license in the patent and that the failure was an "inadvertence" or the result of "carelessness on the part of some subordinate officer or employee".

Notwithstanding these considerations, the court evidently did not feel entirely secure in his reasoning or conclusions, so he charges the defendant with notice of "plaintiff's right" and holds him, in effect, estopped to assert the full right granted by his patent. Upon this point it is well to quote the court in full. He says:

"It is hardly possible to contend that the defendant was in any wise misted to his injury. Admittedly he knew that the plaintiff was maintaining and operating the transmission line, and so far as appears he was willing to purchase the property subject to such right as it then had. When he made his offer he had no assurance or intimation that a patent would be issued without a notation referring to the right of way. Accordingly it is held that neither the integrity nor the extent of the plaintiff's right was affected by the issuance of the patent."

Was it not just as reasonable, and more in keeping with the established rules of law and practice, for the homesteader to suppose that after advertising to prove up on his homestead, any one who claimed a superior or adverse right in the land would appear and make his protest and that any mere revocable license held by any one would be terminated upon the issuance of patent? Why should the homesteader suppose or have reason to believe for a moment that the uniform and well established rule of law that a conveyance of the fee title revokes a license would or could be set aside or disregarded in his case? Can a court say that the homesteader would have taken this tract of land had he been apprised that this license would be construed to be in effect an easement? Why should the homesteader suppose for a moment that any reservations not directed or required by law would be made in his patent? And if none was made, why should he suppose the omission was a mistake or an inadvertence?

The second branch of the opinion, dealing with the width and extent of the Company's easement or right of way, drove the court to the necessity of doing by judicial decree what neither Congress nor the Interior Department had attempted to do, by either legislative or executive action, viz.: Specify the manner of enclosure and mode of use of this license or permit right which has thus ripened into a permanent easement over the defendant's land for which he holds a fee simple patent from the United States.

We most respectfully submit that the judgment and decree of the trial court should be reversed and the cause should be remanded with instructions to the lower court to dismiss plaintiff's actions against defendants and that defendants recover their costs.

Respectfully submitted,

JAMES F. AILSHIE, RAY AGEE,

> Coeur d'Alene, Idaho, Solicitors for Appellants.

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JOHN SWENDIG, JAMES W. MILLER, REMIGUS, GRAB and ANTHONY KERR,

Appellants,

THE WASHINGTON WATER POWER COMPANY, a corporation,

Appellee.

Upon appeal from the District Court of the United States for the District of Idaho, Northern Division

BRIEF OF APPELLEE

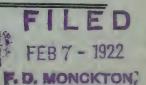
JOHN P. GRAY, Coeur d'Alene, Idaho,

FRANK T. POST,

Spokane, Wash.,
Attorneys for Appellee.

Filed:_____Clerl

HAW & BORDEN CO. 197226





INDEX

I	Page
Answers	6
Appellant's Contention	8
Appendix	28
Complaint	5
Decree of Court	9
Facts	7
Form of Patent	20
Patrol Road	24
Statement of Facts	1
Testimony of Defendants (Appellants)	8

TABLE OF CASES

Pa	ge
Chicago M. & St. P. R. Co. v. Cass County, 76 N. W. 239	26
Heath v. Wallace, 138 U. S. 573	17
Illinois Cent. R. Co. v. Taylor, 177 S. W. 293; 175 S.	
W. 26	25
In Re Annie Knaggs, 9 L. D. 49.	22
Jamestown & Northern R. Co. v. Jones, 177 U. S. 125	21
Joy v. St. Louis, 138 U. S. 1-44	25
Letter of August 23, 1912	16
McMillan Reservoir Site, 37 L. D. 6.	21
Smith v. Townsend, 148 U. S. 490.	21
State v. Stoll, 17 Wallace, 425-431	22
Stoddard v. Chambers, 2 Howard, 284	20
United States v. Moore, 95 U. S. 760.	17
Washington Water Power Co. v. Harbaugh, 253 Fed. 681	20

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JOHN SWENDIG, JAMES W. MILLER, REMIGUS, GRAB and ANTHONY KERR,

Appellants,

THE WASHINGTON WATER POWER COMPANY, a corporation,

Appellee.

No.

BRIEF OF APPELLEE

STATEMENTS OF FACTS

The Washington Water Power Company is engaged in the generation and distribution of electricity in the States of Idaho and Washington.

Prior to the 7th of July, 1902, the power company filed an application with the Department of the Interior for a permit for a right of way across, and permission to construct and maintain an electric power transmission line, over and across the Coeur d'Alene

Indian Reservation. The application was made in pursuance of the provisions of the act of February 15, 1901 (31 Stats. at Large, 790), which act is as follows:

"That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the public lands, forest and other reservations of the United States, and the Yosemite, Sequoia, and General Grant national parks, California, for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes, and for canals, ditches, pipes and pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs used to promote irrigation or mining or quarrying, or the manufacturing or cutting of timber or lumber, or the supplying of water for domestic, public, or any other beneficial uses to the extent of the ground occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits or water plants, or electrical or other works permitted hereunder, and not to exceed fifty feet on each side of the marginal limits thereof, or not to exceed fifty feet on each side of the center line of such pipes and pipe lines, electrical, telegraph, and telephone lines and poles, by any citizen, association, or corporation of the United States, where it is intended by such to exercise the use permitted hereunder or any one or more of the purposes herein named: Provided, That such permits shall be allowed within or through any of said parks or any forest, military, Indian, or other reservation only upon the approval of the chief officer of the Department under whose supervision such park

or reservation falls and upon a finding by him that the same is not incompatible with the public interest: Provided further, That all permits given hereunder for telegraph and telephone purposes shall be subject to the provision of title sixty-five of the Revised Statutes of the United States, and amendments thereto, regulating rights of way for telegraph companies over the public domain: And provided further, That any permission given by the Secretary of the Interior under the provisions of this Act may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park."

Under date of July 7, 1902, the permission applied for was given by the Secretary of the Interior in accordance with the provisions of the act of Congress above referred to and the regulations thereunder.

At the time the permit was given, the lands over which the right of way was sought were a part of the Coeur d'Alene Indian reservation, unsurveyed and not open to settlement.

Pursuant to the permit, the Washington Water Power Company constructed over and across the reservation a high tension electric power transmission line extending from Spokane, Washington, to Burke, Idaho, in the Coeur d'Alene mining district, which line has ever since the month of August, 1903, been used for the purpose of supplying electric power and energy to the Coeur d'Alene mining district.

At about the same time, the Washington Water Power Company filed an application with the Department of the Interior for authority to construct a telephone line over and across the Indian reservation under and pursuant to Section 3 of the act of Congress approved March 3, 1901, "An Act making appropriation for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, nineteen hundred and two, and for other purposes." The right and authority to survey, locate and maintain that telephone line was granted by the Secretary of the Interior upon the payment of the damages and compensation assessed under his direction, amounting to the sum of \$224, which was paid by the Water Power Company into the office of the Commissioner of Indian Affairs.

That telephone line is constructed upon the same poles as the electric power transmission line and is used in connection with and is incidental to the power transmission line.

For the purpose of constructing and maintaining the line, a patrol road was built during the years 1902 and 1903 along which the patrolmen of the Water Power Company pass in patrolling the line

and in keeping the same in repair and available for use.

After the construction of the power and telephone lines and the patrol road, and in 1906, Congress passed an act making provision for the allotment of lands to the members of the Coeur d'Alene tribe of Indians within the reservation, and the subsequent opening of the reservation to settlement.

In the year 1910, the appellants made homestead filings upon lands within the reservation over and across which the power and telephone lines had been constructed. The appellants subsequently made entry and received patents for said lands.

The appellants interfered with the employes of the Washington Water Power Company passing along and patrolling the said road and in various manners asserted their claim that the Water Power Company had no right to go along said right of way or upon the said lands for the purpose of repairing, maintaining or patrolling the line.

COMPLAINT

The Washington Water Power Company brought four several actions against the appellants seeking injunctions restraining the appellants from interfering with the Water Power Company in operating and maintaining the power transmission line, telephone line and patrol road, and praying that the court de-

cree that the permit and easement issued therefor were, and each of them was, in full force and effect and had not been annulled, revoked or modified by the homestead entries and patents issued to the appellants.

Jurisdiction was based upon the ground that the suits involved the construction and application of the act of February 15, 1901 (Chapter 372, 31 Stats. at Large, 790), being the act under which the permit for the power line was granted; the act of March 3, 1901 (31 Stats. at Large, 1083), the act under which the easement for the telephone line was granted, and the act of June 21, 1906 (34 Stats. at Large 335), the act opening the Coeur d'Alene Indian reservation, and also upon the ground that there was a diversity of citizenship

The jurisdictional value was alleged, shown and not controverted.

THE ANSWERS

The answers raised many issues which were at the trial practically limited to one, namely, the question of whether or not the patents cancelled and revoked the rights theretofore granted by the government to the Washington Water Power Company to construct, maintain and operate its power transmission and telephone lines and patrol road. The four cases were consolidated for trial and appeal, it appearing that the same question was involved in each of the cases.

THE FACTS

There was little controversy concerning the facts. The Washington Water Power Company showed that it had received the permit for the power transmission line and the easement for the telephone line, as alleged in the complaint; had constructed the same in the years 1902 and 1903, and had at all times since that date maintained the same, together with a patrol road along the line.

The plats of the two townships within which the lands of the appellants fall were introduced in evidence (Exhibits 1 and 2). It is shown by the plats, as well also by the testimony of the Receiver of the government Land Office, that the plats upon their face showed the power line across the townships. (R. p. 55).

It was shown that the power line is constructed along the right of way granted by the Secretary of the Interior (Logan, R. pp. 59-60). The necessity for patrolling the line and the reasons therefor and the necessity for a patrol road along the line was shown by the testimony of John B. Fiskin (R. pp. 61 to 63), the testimony of LeRoy Hooper, a patrolman (R. pp. 64 to 66), and the testimony of A. H.

Beckwith (R. pp. 67 to 68). It was also shown that the road and pole line are in the same place where they were built in the years 1902 and 1903 by the testimony of E. S. Crane (R. pp. 68-9). Mr. Crane and Mr. Hooper also testified to the interference by fences and plowing with the use of the patrol road.

TESTIMONY FOR DEFENDANTS (APPEL-LANTS)

The defendants (appellants) each testified that they had entered upon the land and secured patents therefor and each of them admitted that the power line was constructed across his land when he first settled there.

Miller testified:

"This power line across my land was there when I first settled on the land. I knew it when I made my first entry. It is in the same place as it was at that time." (R. p. 70.)

Appellant Swendig testified that it was across the land upon which he settled when he first settled there (R. p. 71).

Appellant Grab testified that when he settled on the land the power line ran across it (R. p. 72). So also did the appellant Kerr (R. p. 73).

THE APPELLANTS' CONTENTION

The appellants simply contend that the permits and

casements to the Water Power Company and its right to maintain and operate the line were revoked by the subsequent issuance of patents to appellants.

THE DECREE OF THE COURT

The trial court held otherwise and decreed:

- (1) That the permit granted by the Secretary of the Interior under the act of February 15, 1901, for the electric power transmission line was a valid and subsisting permit and in full force and effect and that the Washington Water Power Company is in possession of the right of way and of the power transmission line constructed over and across the same;
- (2) That the Washington Water Power Company is the owner of a right of way easement for a telephone line over the identical right of way for the electric power transmission line and that the telephone line as now constructed is incidental to the use of the power transmission line and said right of way casement is now in full force and effect;
- (3) That the plaintiff is entitled to maintain along the transmission line and telephone line a roadway which must be within 50 feet of the center of said line as now constructed and the agents, servants and employes of the Water Power Company are entitled to go along the same at all times and keep and maintain the roadway for such purpose;
 - (4) That the plaintiff is further entitled in making

repairs or renewals to the use of such land within 50 feet of the center of said line as may be necessary therefor;

(5) That the title of the defendants is subject to the foregoing rights of the Water Power Company.

It was further decreed that if any of the defendants (appellants) maintains any fence or fences on around or across the lands he must provide gates therein for the plaintiff's use of sufficient width for the passage of ordinary vehicles at the places where the roadway passed through such fences, and the Water Power Company should furnish locks and keep the gates locked.

The court further enjoined the defendants (appellants) from interfering with the plaintiff in the maintenance and operation of said power line, telephone line and patrol road, or in making repairs or renewals.

It was decreed that the rights of the plaintiff (appellee) should be limited to the strip of land 50 feet on each side of the electric power transmission line and that subject to the plaintiff's (appellee's) reasonable needs, the defendants (appellants) should have the right to occupy and use the strip of land and the Water Power Company and its employes, in going along said road, should use reasonable care to do no

more injury to the defendants' growing crops than may be reasonably necessary, and must keep within 50 feet of the center line and in a roadway on one side or the other thereof, except as may be necessary in passing from the road to the poles or line, and that in making repairs or renewals reasonable care should be exercised not to do unnecessary damage to crops growing along the line. (R. pp. 75 to 80).

From that decree this appeal has been taken

ARGUMENT

In compliance with the provisions of the acts of Congress above referred to, the Washington Water Power Company applied for and received a permit to construct a power line and an easement to construct along the power line a telephone line. At the time these rights were granted by the United States, the lands were unsurveyed lands within an Indian reservation.

Upon receiving the permit and easement, the Water Power Company expended a large sum of money in the construction of the power line from Spokane, Washington, to the Coeur d'Alene mining district, the section of the line across the reservation being only a part of the entire transmission line, but its use is essential to the maintenance of the service upon the entire line.

Notwithstanding the large investment in the construction of this line; notwithstanding that it serves a public use and was intended to serve a public use when the permit was granted and the line constructed, it is the contention of appellants that the subsequent surveying of the land and the patenting of it by the United States in itself revoked both the permit to construct and maintain the electric power transmission line and the easement to construct and maintain the telephone line.

The precise question was once before decided by Judge Dietrich in the case of

Washington Water Power Co. vs. Harbaugh, 253 Fed. 681

The Harbaugh case involved the same power transmission and telephone line over another tract of land. Discussing this precise question, Judge Dietrich in that opinion said:

"It is not questioned by the defendant that the plaintiff duly procured a right of way for the maintenance of a telephone line, and a permit for the construction and maintenance of its power line, at the dates hereinbefore stated and pursuant to the provisions of the acts of Congress above cited. His contention is that the telephone line is a mere incident of the power line, and that for the transmission line the plaintiff never acquired anything more than a revocable license, and that the issuance of the patent *ipso*

facto operated to revoke the license. It seems clear that the right acquired for the telephone line was in the nature of an easement, and right acquired for the maintenance of a power line was in the nature only of a permit or license revocable at the will of the Secretary of the Interior. It is further true that the telephone line is a mere incident of the transmission line. Hence, the controlling question is whether the license or permit for the power line was revoked by the issuance of patent. In transactions between private individuals the general rule is that a conveyance of the land by the licensor operates to revoke the license, and all rights and privileges of the licensee terminate as of course. This principle, it seems, was for some time recognized by express rule of the Interior Department, as being applicable to licenses granted under the Act of February 15, 1901, but upon August 23, 1912, after consideration, the conclusion was reached by the Department that to effectuate the purpose of the statute, it is necessary that a permit once given should be superior to the rights of the subsequent patentee of the land until such time as the permit is duly revoked by the Secretary of the Interior in the exercise of the express authority given by the statute.' (Letter of August 23, 1912, to the Commissioner of the General Land Office, by Walter L. Fisher, Secretary of the Interior.) In discussing the question, among other things, the Honorable Secretary said: 'The rule of private real property law under which such a license is revoked by the transfer of the fee simple title has no application to either the legal or the economic data with which Congress was dealing in this legislation, and therefore the intent to enact the said rule should not be imputed to Congress in the absence of clear implication of

such intent.' And again:—'In view of the permanent character of the works authorized to be constructed under the Act of February 15, 1901, and the large investment necessary to such construction, the statute ought not to be interpreted as giving a precarious tenure except insofar as clearly appears from the words used by Congress. After careful consideration of the matter, I am of the opinion that the intent of Congress was to protect the public by retaining in the hands of the Secretary of the Interior full control over water power development, through the device of making permits revocable at his discretion. The statute authorized, in more generous and comprehensive terms than had been used in any preceding statute, the development of water for domestic and public supply, irrigation, mining, and power, and also the development and transmission of electricity. Its primary purpose was to encourage development under unquestioned public control. The former regulation, which provided that 'the final disposal by the United States of any tract traversed by the permitted right of way is of itself, without further act on the part of the Department, a revocation of the permission, so far as it affects that tract,' was directly contrary to the purpose of the statute as above interpreted. It discouraged development by making the title of the permitee subject to that of the final patentee of the land occupied under the permit, and it abandoned all attempt at public control as soon as the land was finally disposed of.' Accordingly, by express regulation, which was still in force at the time the defendant purchased the land and received his patent, it was provided that 'the final disposal by the United States of any tract traversed by a right of way permitted under the

said act shall not be construed to be a revocation of such permission in whole or in part, but such final disposal shall be deemed and taken to be subject to such right of way until such permission shall have been specifically revoked in accordance with the provisions of said act.'

It is to be admitted that the language of the act does not put the intent of Congress beyond all doubt, but the reasoning of the Honorable Secretary as in part set forth in the foregoing extracts from his letter of August 23, 1912, is not without force, and besides, under a familia. rule, some weight is to be accorded to the practical construction given to a doubtful statute by a high administrative officer. The view is there fore, adopted that the issuance of the patent to the defendant did not revoke the plaintiff's license. It may be unfortunate, but it is not of controlling importance, that the patent did not contain a notation referring to the plaintiff's right of way, as required by the regulations of August 23, 1912. The record does not purport to furnish any explanation for this omission, but in view of the other express provisions of the regulations it cannot be held that the silence of the patent in this respect imports an intent on the part of the Secretary of the Interior to revoke the license. It is much more reasonable to assume that the absence of the notation is the result of inadvertence or carelessness on the part of some subordinate officer or employe, and neither the right of the plaintiff to use such right of way nor of the Government to control it could be divested by a mere clerical omission. It is hardly possible to contend that the defendant was in any wise misled to his injury. Admittedly he knew that the plaintiff was maintaining and operating the transmission line, and so far as appears he was willing to purchase the property subject to such right as it then had. When he made his offer he had no assurance or intimation that a patent would be issued without a notation referring to the right of way. Accordingly it is held that neither the integrity nor the extent of the plaintiff's right was affected by the issuance of the patent."

The court thereupon, in that case, further considered the question of the extent of the right to patrol and also to repair and reached the conclusion which he followed in the present case.

The decision of Judge Dietrich was in harmony with the construction which had been given to the statute by the Secretary of the Interior. Under date of August 23, 1912, the Secretary of the Interior in a letter to the Commissioner of the General Land Office held that:

"To effectuate the purpose of the statute it is necessary that a permit once given (under the act referred to) should be superior to the rights of the subsequent patentee of the land until such time as the permit is duly revoked by the Secretary of the Interior in the exercise of the express authority given by the statute."

That decision of the Secretary of the Interior was introduced in evidence and for convenience is incorporated in the record as Plaintiff's Exhibit No. 14 (Rpp. 101 to 110).

The construction of statutes by executive departments charged with the duty of administering them

should not be overruled without cogent reasons, and a settled construction of such statutes by the officers of one of the great executive departments of the government should not be overruled unless it is clearly erroneous.

> United States v. Moore, 95 U. S. 760. Heath v. Wallace, 138 U. S. 573.

Such has always been the interpretation of the act of February 15, 1901, in so far as it affects permits granted within forest reserves. The administration of that act so far as it affected forest reserves was under the supervision of the Department of Agriculture. That such is the construction of that department is shown by the letter of Secretary Fisher of August 23, 1912.

In the case at bar, a motion was made to dismiss the complaints, but was overruled in a memorandum decision by Judge Dietrich, following the Harbaugh case (R. pp. 52-53).

It was maintained by counsel for appellants that a subsequent decision of the Secretary of the Interior in the case of one Nye dated April 28, 1921, overruled the previous construction of the law by the department. That ruling is found at pages 111 to 116 of the record.

Involved in the Nye case, was a permit to overflow certain lands within the Coeur d'Alene Indian reservation, and the Secretary of the Interior, for reasons which he considered equitable and there set out, revoked that permit in so far as Nye and certain other entrymen were concerned, leaving it in force as to other entrymen.

It was urged upon the court below that under the decision of Secretary Fall, that where patents have been issued upon entries made prior to August 23, 1912, that such patent revoked the permit. Judge Dietrich, however, expressly held to the contrary. Judge Dietrich held that the remedy of the defendants (appellants) if any they had, is in an application to the Secretary of the Interior to revoke the permit for the transmission line across the lands patented to them rather than an application to the court. The decision of Judge Dietrich in this case is not contained in the record, but is attached to this brief as Appendix 1. Treating particularly of the decision of Secretary Fall, Judge Dietrich said:

"I have read this recent decision of the Secretary of the Interior, and it must be clear, I think, that he does not intend to modify the ruling insofar as the ruling of August 24, 1912, was one of law. The decision would be inconsistent in itself if that view be taken; it would indicate a discrimination between two classes of settlers. If as a matter of law the patents which were issued upon entries made prior to August 24, 1912, conveyed the entire title free from the burden of this power line, then it would not be for the Secretary now to say that some of those patents or some of those titles shall be free from the incumbrance

and that others shall still continue to bear it. There would be no reason for discriminating or distinguishing between those who bought before and those who bought after August 24, 1912. As I understand, here, he revokes the permits and recalls the patents and promises to issue other patents only to certain holders of title upon entries which were made prior to August 24, 1912. But if, as is now contended as a matter of law, those settlers took the title regardless of what the Department may have undertaken to do, when asserting reservations in the patents, then of course any such attempted discrimination or distinction would be futile; they would all stand upon the same footing. It is quite clear, I think, from the fact that the Secretary refers to the status of the proceeding there to revoke the permit, the petition for rehearing or review, that he is really exercising here his discretion in favor of certain settlers who make a strong equitable appeal. In that view of course the remedy of these defendants is an application to the Secretary of the Interior rather than to the court. The court is bound by the legal status of the title. It seems to be admitted by counsel for the plaintiff that it is within the discretion of the Secretary of the Interior to revoke these permits. However that may be, they would apparently have the same right to make an appeal to the Secretary of the Interior that the settlers on the flooded lands had, in the case which has been called to our attention. Clearly, however, this court hasn't any power to exercise such discretion. Either the permit is valid as a matter of law, and subsisting, or it was terminated by the issuance of patent.

"I think I shall take the same view, gentlemen, that I have heretofore taken. The relief prayed for will be granted. Decree substantially in the form entered in the Harbaugh case will be entered. As I remember, the decree was somewhat guarded so as not to work unnecessary injury to the farmers."

THE FORM OF THE PATENT.

The patents to all of the lands were issued subsequent to the decision of the Secretary of the Interior of August 23, 1912, but the patents did not expressly except the right of way for the power transmission line and telephone line. As Judge Dietrich said in the Harbaugh case:

"The record does not purport to furnish any explanation for this omission, but in view of the other express provisions of the regulations, it cannot be held that the silence of the patent in this respect imports an intent on the part of the Secretary of the Interior to revoke the license. It is much more reasonable to assume that the absence of the notation is the result of inadvertence or carelessness on the part of some subordinate officer or employe, and neither the right of the plaintiff to use such right of way nor of the Government to control it could be divested by a mere clerical omission."

The issuance of a patent is a mere ministerial act, and if it be issued for lands reserved from sale by law it is void.

Stoddard v. Chambers, 2 Howard, 284.

That the patent contains no express reservation of a right of way is of no consequence.

Jamestown & Northern R. Co. v. Jones, 177 U. S. 125.

Smith v. Townsend, 148 U.S. 490

Construing the act of March 3, 1891, the Interior Department held that an easement attaching to public lands by the construction of a reservoir and canals upon a right of way acquired thereunder does not, upon acquisition of such irrigation system by the United States for use in connection with a project under the reclamation act, become extinguished by merger in the estate of the government, and that entries allowed for lands within and below the flowage contour line of the reservoir as marked upon the township plat, are subject to the right of flowage by the storage of waters in the reservoir.

McMillan Reservoir Site, 37 L. D. 6.

That case is precisely in point with the case here with the single exception that in the case at bar the right acquired under the act of February 15, 1901, is a permit which is revokable by the Secretary of the Interior, whereas in the other case it is called an easement.

The act of June 21, 1906, opening the Coeur d'Alene Indian reservation is not inconsistent with or repugnant to the act of February 15, 1901. It has been contended that the issuance of the patent itself was a revocation of the permit. The Secretary of the Interior discusses and disposes of this in the

decision and letter of August 23, 1912. It is also discussed and passed upon by Judge Dietrich in the decision in the Harbaugh case. The two acts are not inconsistent. In

State v. Stoll, 17 Wallace, 425-431

this principle is laid down:

"It must appear that the later provision is certainly and clearly in hostility to the former. If by any reasonable construction the two statutes can stand together, they must so stand. If harmony is impossible, and only in that event, the former law is repealed in part or wholly, as the case may be."

And such also has been the view adopted in the construction of other statutes by the Land Department. The doctrine of the department is well stated by Secretary Noble in

In re Annie Knaggs, 9 L. D. 49

as follows:

"Statutes are repealed by express provisions of a subsequent law, or by necessary implication, and in the latter case there must be such a positive repugnancy between the provisions of the old and new law that they cannot stand together, or be consistently reconciled. Repeals by implication are not favored in law, and are never allowed but in cases where inconsistency and repugnancy are plain and unavoidable, and it is a question of construction whether or not an act professing to repeal or interfere with the provisions of a former law operates as a total, or

partial, or temporary repeal; and if there are two acts seemingly repugnant, if there is no clause of repeal in the latter, they shall, if possible, have such construction that the latter may not be a repeal of the former by implication."

The object of the act of February 15, 1901, was to foster the development of the resources of the country by the generation and distribution of electric power and by the promotion of irrigation, mining, manufacturing, supplying of water for any beneficial use and many other legitimate commercial purposes. Manifestly, it was not intended by Congress that when a permit had been granted by the Secretary of the Interior under the act, such permit should be revoked, except when there was a just and substantial reason therefor and such as was recognizable in a court of equity. Large investments necessarily were to be made under such permits, and it is not reasonable to believe that it was the intention of Congress that when a permit was issued for such a right of way over an Indian reservation, thereafter the mere opening of the Indian reservation to selection, allotment and entry would or should result in a revocation of the permit. Had any such intention been expressed in the act, it is clear that no such large investments would ever have been made. The act was intended to encourage development and not to make it hazardous.

The power of revocation was retained in the department in order that certain governmental control might be exercised in harmony with a growing sentiment that some such control should be retained. There is nothing to indicate that the Secretary of the Interior has ever, in the exercise of his discretion or at all, revoked or intended to revoke the permit of the Washington Water Power Company.

THE PATROL ROAD.

It is urged that the grant of a right of way for the construction and maintenance of a high tension power line does not carry with it the right to use a patrol road along the line. That the road is necessary in the construction of the line must of course be conceded. The evidence shows without contradiction that the maintenance of the road along the line is essential, first, for the purpose of patrolling the road, and second, for the purpose of making any repairs or replacements that may be necessary. It is just as essential to the useful development of the resources of the country that the means of use be maintained as it is that means of use be constructed. Certainly, it was within the intent of Congress in granting such right of way for electric power transmission lines as a necessary incident thereto to grant the right to go along the line, patrol it and maintain it. No other reasonable conclusion can be arrived at either from the language of the statute or an understanding of the reasons which impelled its enactment.

Moreover, it grants a right of way 100 feet in

width. Such grant must have been for the purpose of conveying the right, not alone to construct, but the right to maintain. A way along the pole line for the employes to pass in patrolling, repairing and replacing it is one of the essential elements to its beneficial use.

To contend that nothing but the bare land upon which the poles stand is granted, is an endeavor to narrow and limit the grant of the right of way beyond all reason. In

Illinois Cent. R. Co. v. Taylor, 177 S. W. 293 it was held:

"Where a railroad company was entitled to a right of way over lands, the 'right of way' includes not only the land immediately beneath the tracks, switches, and buildings used in the operation of the road, but such portions as, in addition, are necessary to the use of the tracks and buildings."

Upon the original hearing of the above case found in the 175 S. W. 26 on page 28, the court discusses the case of

Joy v. St. Louis, 138 U. S. 1-44 and says:

"A reading of the opinion in Joy v. St. Louis makes it very plain that the court did not intend by its language to restrict the 'right of way', as applied to a railroad company, to its tracks or roadbed."

While the question under consideration was a very different one, there is language in the case of

Chicago, M. & St. P. R. Co. v. Cass County, (N. D.) 76 N. W. 239-241

which is applicable here:

"The services which the public expect and demand from the railroad companies constantly grow more onerous. It would, indeed, be a mistaken policy, in our rapidly developing state, to curtail any of the agencies which tend to render this service efficient. We hold, then, that the right of way of a railroad company, or, using the constitutional phraseology, the 'roadway' of a railroad company, includes, not only the strip of ground upon which the main line is constructed, but all ground necessary for the construction of side tracks, turnouts, connecting tracks, station houses, freight houses, and all other accommodations reasonably necessary to accomplish the objects of their incorporation."

The grant of a right of way must be construed reasonably and in the light of surrounding circumstances so as to ascertain the intent of the parties.

The appellee was granted a permit to construct this line in accordance with the laws of the United States. That permit has never been revoked. Public policy would seem to demand that an investment such as is required in a case of this kind was not intended by Congress to be as hazardous as the contention of appellants would make it in this case.

We submit that the judgment and decision of the court below should be affirmed.

Respectfully submitted,

JOHN P. GRAY, FRANK T. POST, Attorneys for Appellee.

APPENDIX 1.

In the District Court of the United States for the District of Idaho, Northern Division

WASHINGTON WATER POWER COMPANY, a corporation,

Plaintiff,

v.

Dicision.

JOHN SWENDIG, JAMES W. MIL-LER, REMIGUS GRAB and TONY KERR,

Defendants.

There is very little to be said in addition to what I have already tried to say upon the general questions which have been submitted. I am not without appreciation of the points argued by Judge Ailshie and by counsel in the other case, that ordinarily in case of private licenses or licenses given as between private persons, the disposition of the property by the licensor terminates the license. There are exceptions to that rule, but it is recognized as a general rule. I read these patents to the defendants in this case the same as if a reservation of this right of way were contained therein, or this permit or license, whatever it may be called. It is true the patents themselves do not contain in terms such a reservation, but at the

time they were issued there was this general regulation of the Secretary of the Interior that all patents thereafter issued,—and these patents were subsequently issued,—shall be subject to the right of way for this power line, and hence it cannot be successfully contended that it was the intention of the Land Department to issue the patents free from this burden of the power line. I have felt that while the guestion is a close one, it is rather a question of the power of the Land Department and that what it actually undertook to do; it actually undertook to reserve this right of way, or to at least hold within its power the discretion either to continue the permit or to revoke it. Now whether it had that power under the statute is another question, a close one, it may be admitted; but that question was considered both in the Harbaugh case and upon the demurrers in these cases, and I am not inclined now to recede from the conclusion already reached.

I have read this recent decision of the Secretary of the Interior, and it must be clear, I think, that he does not intend to modify the ruling insofar as the ruling of August 24, 1912, was one of law. The decision would be inconsistent in itself if that view be taken; it would indicate a discrimination between two classes of settlers. If as a matter of law the patents which were issued upon entries made prior to August 24, 1912, conveyed the entire title free from the burden of this power line, then it would not be

for the Secretary now to say that some of those patents or some of those titles shall be free from the incumbrance and that others shall still continue to bear it. There would be no reason for discriminating or distinguishing between those who bought before and those who bought after August 24, 1912. As I understand, here, he revokes the permits and recalls the patents and promises to issue other patents only to certain holders of title upon entries which were made prior to August 24, 1912. But if, as is now contended, as a matter of law, those settlers took the title regardless of what the Department may have undertaken to do, when asserting reservations in the patents, then of course any such attempted discrimination or distinction would be futile; they would all stand upon the same footing. It is quite clear, I think, from the fact that the Secretary refers to the status of the proceeding there to revoke the permit, the petition for rehearing or review, that he is really exercising here his discretion in favor of certain settlers who make a strong equitable appeal. In that view of course the remedy of these defendants is an application to the Secretary of the Interior rather than to the court. The court is bound by the legal status of the title. It seems to be admitted by counsel for the plaintiff that it is within the discretion of the Secretary of the Interior to revoke these permits. However that may be, they would apparently have the same right to make an appeal to the Secretary of the

Interior that the settlers on the flooded lands had, in the case which has been called to our attention. Clearly, however, this court hasn't any power to exercise such discretion. Either the permit is valid as a matter of law, and subsisting, or it was terminated by the issuance of patent.

I think I shall take the same view, gentlemen, that I have heretofore taken. The relief prayed for will be granted. Decree substantially in the form entered in the Harbaugh case will be entered. As I remember, the decree was somewhat guarded so as not to work unnecessary injury to the farmers.



United States

Circuit Court of Appeals

Hor the Ninth Circuit

JOHN SWENDIG, JAMES W.
MILLER, REMIGIUS GRAB, AND
ANTHONY KERR,

Appellants

US.

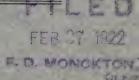
THE WASHINGTON WATER POW-ER COMPANY, a corporation,

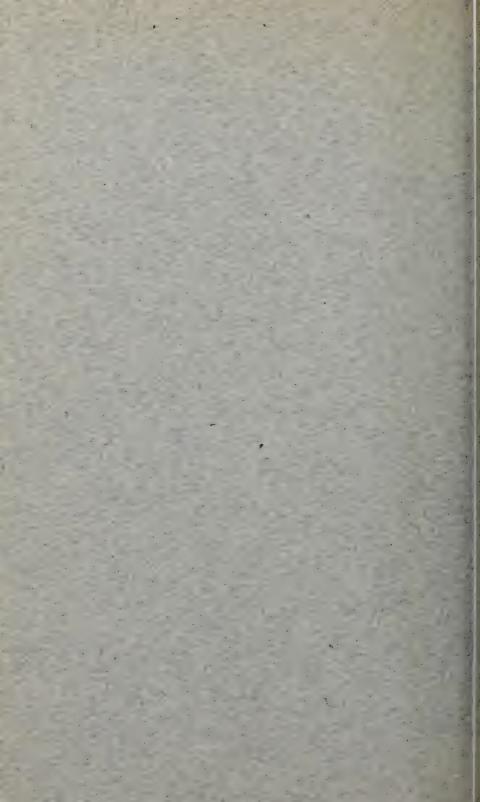
Appellee

Memorandum Reply to Appellee's Brief

UPON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF
IDAHO, NORTHERN DIVISION

JAMES F. AILSHIE, Solicitor for Appellants





In the

United States

Circuit Court of Appeals

Hor the Ninth Circuti

JOHN SWENDIG, JAMES W. MILLER, REMIGIUS GRAB, AND ANTHONY KERR,

Appellants

US.

THE WASHINGTON WATER POWER COMPANY, a corporation, Appellee

We have examined the cases cited in Appellee's Brief, and it seems to us that not one of them bears any analogy to the one at bar, except the Harbaugh case decided by the same trial court from which this appeal is taken. Counsel seem to make no distinction between decisions on *easements* and those applying to mere *licenses*.

United States v. Moore, 95 U. S. 760, cited by appellee, was a case involving the status of an Assistant Surgeon in the Navy. There were two inharmonious statutes dealing with

the qualifications and right of advancement for such officers. The court, observed that the construction given to a statute by those charged with the duty of executing it is always entitled to a most respectful consideration, but the case was not determined upon that point. In concluding the opinion the Court said:

"In cases like this, the construction should be such that both provisions, if possible, may stand. The clause in question was obviously as much intended to have effect as the section with which it is in seeming conflict. It may well be held to be an exception, though not so expressed, to the universality of the language of the latter. This obviates the difficulty, harmonizes the provision, and gives effect to both."

In Heath v. Wallace, 138 U. S. 573, cited by counsel, the question arose as to whether "Lands subject to periodic overflow" were "swamp lands" within the meaning of the Swamp Land Grant made to the State of California by Act of September 28, 1850. The Department caused an investigation to be made by the Surveyor General, and upon the facts held that the land was not swamp land. The court held that the findings by the Department were conclusive on such question, and cited with approval U. S. v. Moore, supra. It will be observed that this line of authorities, (and there are many cases to the same effect), simply holds that findings of fact on Departmental matters within the jurisdiction of such Department will not be disturbed by the courts, and that where a statute is ambig-

uous, indefinite, or easily capable of different constructions, the courts will not disturb a construction which has been adopted and acted upon by the Department.

Stoddard v. Chambers, simply holds that a patent issued for lands reserved from sale by law are not public lands or subject to sale, and that such patent is simply void. Neither the facts nor the law discussed in that case have any bearing or throw any light upon the case at bar. Here the land patented to appeallans was public land subject to entry and sale.

Jamestown & Northern R. R. Co., v. Jones, 177 U. S. 125, cited by counsel, is dealing with the Act of 1875 granting a right of way through public lands to railroad companies, and holds that a definite location of the right of way of a railroad is sufficiently made by the actual construction of the road upon the ground although no profile map was ever filed. This case in no way affects the case at bar or throws any light on it.

The case of Smith v. Townsend, 148 U. S. 490, is a case determining the right of one who was within the territorial limits of Oklahoma Territory at the hour of noon, April 22, 1889, to take a homestead under the Act throwing that territory open to homestead entry, and holds that such a person was disqualified to make an entry.

The Act of June 21, 1906, (34 Stat. at Large 335), provided for the opening of the Coeur d'Alene Indian Reservation

and allotment of lands to each man, woman and child, belonging to the Indian tribes, and that the "residue or surplus lands should be opened to settlement and entry under the provisions of the homestead law", and that the money to be derived from the disposition of these lands should be turned into the fund and credited to "the Coeur d'Alene and Confederated Tribes of Indians. Up to this time neither the Government nor the Indian tribes had received any compensation whatever from plaintiff for an easement or right of way through the Coeur d'-Alene Indian Reservation for electrical power purposes. When the tracts were disposed of to defendants they purchased and paid for the entire acreage, including the right of way now claimed by plaintiff. If plaintiff is to continue to occupy and use this right of way without paying "just compensation" therefor under the laws of the State of Idaho providing for condemnation of easements, then, of course, it will be getting its entire right of way through this land free, and defendants, on the other hand, will have paid the Government, for the benefit of the Indian tribes, the full value thereof, and will still have to pay taxes thereon and permanently lose the use of this 100 foot strip through their farms. It will have acquired a right of way, it now values at \$25,000.00 (Tr. 14), for nothing, whereas another light or power company going into the same territory at any time since the opening of this reservation and patenting of lands to homesteaders would have to purchase or condemn a right of way for like purposes.

McMillan Reservoir Site, 37 L. D. 6, cited by appellee, is dealing with an easement granted by Act of Congress for reservoirs and canals, and that Act provided that upon the taking of possession and constructing the reservoir or canal within the time limited by the Act the right to the easement should vest, and the Department also held that failure to comply with the Statute in these respects would terminate the right. This is the accepted rule both with reference to rights asserted under the Act granting easements for canals, flumes and reservoirs and the railroad right-of-way Act. In each case the right conferred is an easement and when complied with becomes a vested right. It is very different with the act now under consideration;—here it is specially provided that the permit "shall not be held to confer any right, or easement or interest in, to or over any public lands, reservations, or park." Congress was particularly specific in this respect.

In the case of Nye vs. Washington W. P. Co., the patent on its face specially reserved the permit or easement right granted to the Water Power Company and Nye sought to have his patent amended or a new patent issued so as to be absolute on its face, free from the right of way or servitude. The Secretary ordered Nye's patent, and all others issued under similar circumstances, recalled and new patents issued free from these restrictions (Tr. 111 to 116). Defendants here are not in that position, their patents are absolute on their face and

free of any restrictions or servitude. (Delfts. Exhibits 1 to 4, Tr. 91 to 100).

Even under the railroad right-of-way grants the courts hold that a patent subsequently issued carries the fee, subject only to the easement and that upon abandonment the easement reverts, not to the United States but to the homesteader or patentee.

Denver & R. G. Co. vs. Mills, 222 Fed. 481;

N. P. R. vs. Townsend, 190 U. S 267; 47 L. Ed. 1044.

Furthermore, before the *permit in the Nye case to overflow Indian lands* was granted, the Company was required to pay into the U. S. Treasury \$1.25 per acre (for some 6240 acres) for the use of the land, but here nothing was paid for the use for the transmission line.

Plaintiff's assertion that "public policy would seem to demand that an investment * * * * * was not intended by Congress to be as hazardous as the contention of appellant would make it in this case," seems to be fully answered by the closing paragraph of the Act of February 15, 1901, cited in opening brief, and the existing law of every state. Congress was dealing with *public lands*, *reservations*, etc., and whenever the lands pass into *private ownership* Government control ceases and the owner of a power transmission line has a right to then acquire a

permanent casement by either purchase or condemnation by paying "just compensation" and the remedy afforded is summary and speedy. It is also well established "that statutes granting privileges or relinquishing rights of the public are to be strictly construed against the grantee."

U. S. vs. Utah Power & Light Co., 209 Fed. 559, citing
Wisconsin Central R. Co. v. U. S. 164 U. S. 190;
41 L. Ed. 399; Canfield vs. U. S. 187 U. S. 518; 42 L. Ed. 260.

The right plaintiff contends for here was a *privilege* belonging and pertaining to *the public* and was temporarily conferred upon this company.

Plaintiff's water right and power site are private property and are not subject to Government control as is the case where water and power sites are taken on public lands or within forest reserves or public parks, and when the lands through which its power transmission line runs pass into private ownership, the regulation and control over that land and consequently over any lines running through it, passes to the state.

The Federal Water Power Act of June 10, 1920, (41 Stat at L. 1063) to which reference was made on the oral argument, does not, and could not, give the Commission any jurisdiction,

power or authority over the plaintiff's transmission line through these lands. It is now on private property.

We most respectfully submit that the decision of the District Court amounts to granting the plaintiff a perpetual easement over defendants' lands and an affirmance of that judgment would result in converting a mere license into a perpetual easement and would contravene both the letter and spirit of the Act of Congress under which this permit was granted.

Respectfully submitted,

James F. Ailshie
Solicitor for Appellants.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JOHN SWENDIG, JAMES W. MIL-LER, REMIGIUS GRAB, AND ANTHONY KERR,

Appellants.

_vs---

THE WASHINGTON WATER POWER COMPANY, a Corporation,

Appellee.

PETITION FOR REHEARING

On Appeal From the United States District Court for the District of Idaho, Northern Division.

JAMES F. AILSHIE,

Coeur d'Alene, Idaho. Solicitor for Appellants. FILED
JUL 31 1922



IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JOHN SWENDIG, JAMES W. MIL-LER, REMIGIUS GRAB, AND ANTHONY KERR,

Appellants.

-vs-

THE WASHINGTON WATER POWER COMPANY, a Corporation,

Appellee.

PETITION FOR REHEARING

Now come the appellants and petition the court for a rehearing in the above entitled cause and base their petition upon the following grounds:

1.

That the court in the opinion heretofore filed herein failed to give due consideration to that part of the Act of Congress of February 15, 1901 (31 Stat. at L. 790) which provides "that any permission given by the Secretary of the Interior * * * * shall not be held to confer any right,

or easement or interest in, to or over any public land, reservation, or park."

2.

That the court appears to have applied to appellants the doctrine of estoppel wherein it said, "they are properly chargeable with actual knowledge of the law under and by authority of which those lines were constructed and were being operated and of the right of the appellee to continue to operate them until the permission to do so should be revoked by the Secretary of the Interior." And in so doing the court failed to apply the closing paragraph of the Act of February 15, 1901, and failed to note or give due consideration to the rule promulgated by the Secretary of the Interior (Paragraph II of the Regulations, 31 L. D. 17) which was in force at the time appellants made their filings on these lands which rule is in the following words:

"The final disposal by the United States of any tract traversed by the permitted right of way is of itself, without further act on the part of the Department, a revocation of the permission so far as it affects—that tract, and any permission granted hereunder is also subject to such further and future regulations as may be adopted by the Department."

3.

That the opinion erroneously treats this license as a "right of way" and assumes, contrary to the statute, that some right or power was reserved by the government over the lands after the patent issued.

4.

That the opinion seems to assume that the permit or

license granted appellee was "coupled with an interest" in the lands whereas the Act of Congress expressly negatives any interest whatever.

REASONS FOR REHEARING

It is never an easy matter to apply to an appellate court for a rehearing. The difficulty of doing so arises (a) from the fact that one has already been defeated by the opinion of the court and is necessarily obliged to take issue with some or all of the positions taken by the court, and, (b) because to properly urge and present his contentions for rehearing he may seem to be impertinent or presumptuous.

Knowing, however, that the courts are always more anxious to properly construe the law and do justice than they are mindful of any pride of opinion, we take the liberty of stating herein frankly our position in the hope that we may be able to so emphasize it that the court may finally see the matter from our viewpoint. We think the court, in the very opening sentence of the opinion, began with an erroneous assumption, and that is the assumption that we are in some way or other chargeable with some kind of knowledge which would estop or preclude us from acquiring a clear title and exclusive right of possession to this tract of land. Perhaps our contention in this respect can be better expressed by asking a question than it can by attempting to state a negative. The question may be: How could the homesteader be in any way estopped by

knowledge of the fact that the company line ran across the land when at the same time he was confronted with the printed and official regulations of the department itself stating positively that:

"The final disposal by the United States of any tract traversed by the permitted right of way is of itself, without further act on the part of the Department, a revocation of the permission so far as it affects that tract, and any permission granted hereunder is also subject to such further and future regulations as may be adopted by the Department."

Could not the homesteader rely on the provisions of the closing paragraph of the Act of February 15, 1901, and the foregoing regulation of the Department and the generally accepted law that a license is revoked by a conveyance of the fee? This question is discussed at pages 20 to 24 of appellant's original brief and we will not further repeat it here more than to ask the court to give these matters its further consideration.

In the third paragraph of the opinion, the court says:

"It is conceded—or seems to be conceded, by counsel for the appellants, that had the patents in terms excepted the permits that had been theretofore granted by the Secretary of the Interior in parsuance of the Act of Congress that has been referred to, the previously existing rights of the appellee would not have been affected."

The court must have misapprehended the position we have taken as we have never intended to concede or seem to concede that it was ever within the power of the Sec-

retary of the Interior to have issued a fee simple patent to this tract of land and at the same time to have reserved this license or permit right to either the government or the appellee. Under the land laws as enacted by Congress and the proclamation of the President extending them to the Coeur d'Alene Indian Reservation it became the absolute duty of the land department to either issue patents to these homesteaders upon their complying with the homestead laws or refuse to issue them. Congress had already told the Secretary, and everyone else, that any permits issued under the Act of February 15, 1901, "shall not be held to confer any right or easement or interest in, to or over any public land." The Washington Water Power Company by reason of this permit acquired no better or greater right, title, interest or claim in, to or over this land than it would have had had it been a naked trespasser and built its line without any permit at all. The only difference in the world between the two is that after it is ousted or ejected after having had this permit it is not liable as a trespasser for the time it has been on the land, whereas: if it had been a trespasser, it would still be liable for damages and penalties as such after being ousted or ejected. If it had built this line without any permit and had been on the land as a trespasser at the time of the filing by appellants the subsequent issuance of patent would certainly not have vested in or left in the company any right, license, or easement. Now the question arises in the light of the closing paragraph of the Act of February 15, 1901: What kind of right did Congress expect the licensee to have and receive when the land ceased to be public lands and became private lands? This court has failed to construe or interpret the Act of Congress of February 15, 1922, under which the permit in question was issued. This case rests solely on that Act and the regulations and acts of the Secretary thereunder and we think we are entitled to a direct and explicit construction and interpretation of the closing paragraph of the Act of Congress.

Again it is said in the opinion, "the government could not grant by patent or otherwise what it did not own nor anything more than it owned." This seems to assume a fact that does not exist, namely: that the appellee in this case had acquired title to some kind of an interest or claim in or to this land. But now let us see what the government owned at the time of the entry of this land by appellant and of the subsequent issuance of the patent. It owned the land and the absolute right of exclusive possession. It had given a permit to appellee to build its line across the land and Congress had said to appellant and appellee, and everyone else, that the Secretary of the Interior might revoke this permit at any time in his discretion and at the same time Congress had said that this permit "shall not be held to confer any right or casement or interest in, to or over any public lands." What other or more language could Congress have used than it did use to preclude all notion of any property interest in, to or over the land passing by a permit? The words "right or easement or interest" cover all the property rights that can exist in real estate, and the words "in, to or over" cover all manner and form of interest or property right. Something else must be read into this Act in order to give a permitee an interest in, to or over the land. Now if the Washington Water Power Company, at the time appellants made their entry and later secured their patent, did not have "any right or easement or interest in" this land and did not have any "right to, or over" this land, then what was it that appellee had that the government could not grant or convey by patent? This pertinent legal inquiry cannot be answered by the mere statement of the axiom that a grantor cannot grant any more than he owns.

The further inquiry arises in this same connection: If this so-called permit or license remained in force after the patent was issued, in whom remained the power to revoke it? Was it in the Secretary or was it in the grantee? If the granting of the patent did not revoke the license then the company must have acquired something under the permit which Congress had taken the express precaution to say should not be granted by a permit; and this would lead to the further inquiry as to what Congress really did mean when it added, as the very parting and closing words of the Act, that the permission of the Secretary "shall not be held to confer any right or easement or interest in, to or over any public land." We think that this court is squarely confronted with the necessity and importance of analyz-

ing and construing the foregoing language. We most respectfully submit that this language in the ordinary use of the English is incapable of being construed to permit anything more than a mere revokable license at will.

Finally, in concluding the opinion this honorable court says:

"It would hardly be contended that the appellee could not have at any time transferred or conveyed its power and telephone lines with all incidental rights pertaining thereto to some other company or person or that its rights in the premises would have passed to its creditors in the event it had been unsuccessful in its business."

We make no contention that the appellee could not have sold and disposed of all its property but the only property it had across the land of appellants was its poles and transmission wires. It had no right of way and the grantee would have taken nothing more in the way of an easement or right of way than it would have taken, had the appellee been a naked trespasser. As to whether or not the purchaser from appellee would have legally been entitled to the benefit of the permit so as to protect it from thereafter being a trespasser, we express no opinion for the reason that it is wholly immaterial here. But clearly the purchaser from appellee could not have acquired any greater right than appellee had acquired and the Act of Congress had already stated what that right should be. Not only this but the Secretary of the Interior, by Regula-

tion Number 11, had promulgated to the public at large that the subsequent issuance to appellants of a patent should be "of itself without further act on the part of the Department a revocation of the permission so far as it affects that tract."

For the foregoing reasons and considerations we most respectfully petition and pray the Court for a rehearing herein.

JAMES F. AILSHIE,

Coeur d'Alene, Idaho.

Attorney for appellants.



United States

Circuit Court of Appeals

For the Ninth Circuit.

GONG SIC OR,

Appellant,

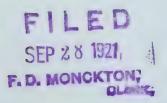
VS.

EDWARD WHITE, as Commissioner of Immigration, Port of San Francisco,

Appellee.

Transcript of Record.

Upon Appeal from the Southern Division of the
United States District Court for the
Northern District of California,
First Division.





United States

Circuit Court of Appeals

For the Ninth Circuit.

GONG SIC OR,

Appellant,

VS.

EDWARD WHITE, as Commissioner of Immigration, Port of San Francisco,

Appellee.

Transcript of Record.

Upon Appeal from the Southern Division of the
United States District Court for the
Northern District of California,
First Division.



INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Cierk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

P	age
Assignment of Errors	14
Certificate of Clerk U. S. District Court to	
Original Exhibits	22
Certificate of Clerk U. S. District Court to	
Transcript on Appeal	19
Citation	20
Demurrer to Petition for Writ of Habeas Cor-	
pus	9
Hearing on Demurrer	10
Minutes of Court May 28, 1921—Hearing on	
Demurrer	10
Names and Addresses of Attorneys of Record	1
Notice of Appeal	12
Order Allowing Petition for Appeal and Re-	
leasing on Bond	16
Order Sustaining Demurrer to Petition for	
Writ of Habeas Corpus	11
Order to Show Cause	8
Petition for Appeal	1 3
Petition for Writ	2
Praecipe for Transcript of Record	1
Stipulation and Order Respecting Withdrawal	
of Immigration Record	18



Names and Addresses of Attorneys of Record.

For Petitioner and Appellant:

JOSEPH P. FALLON, Esq., Hearst Bldg., S. F., Cal.

For Respondent and Appellee:

UNITED STATES ATTORNEY, San Francisco, Calif.

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 17,157.

In the Matter of GONG SIC OR, on Habeas Corpus—#19729/32-2 SS. "Tjikembang," November 26, 1920.

Praecipe for Transcript of Record.

To the Clerk of said Court:

Sir: Please make copies of the following papers to be used in preparing transcript on appeal:

- 1. Petition for writ of habeas corpus.
- 2. Order to show cause.
- 3. Demurrer to petition.
- 4. Minute order regarding immigration record.
- 5. Judgment and order dismissing order to show cause and denying petition for writ.
 - 6. Notice of appeal.
 - 7. Petition for appeal.
 - 8. Assignment of errors.
 - 9. Order allowing appeal.

- 10. Stipulation and order regarding immigration record.
 - 11. Clerk's certificate.
 - 12. Citation on appeal.

JOSEPH P. FALLON, Attorney for Petitioner.

[Endorsed]: Filed Aug. 27, 1921. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [1*]

In the Southern Division of the United States District Court in and for the Northern District of California, First Division.

No. 17,157.

In the Matter of GONG SIC OR (19729/32-2 Ex SS. "Tjikembang" 11/26/20), on Habeas Corpus.

Petition for Writ.

To the Honorable, United States District Judge, Now Presiding in the United States District Court, in and for the Northern District of California, First Division.

It is respectfully shown by the petition of the undersigned that Gong Sic Or, hereafter in this petition referred to as "the detained," is unlawfully imprisoned, detained, confined and restrained of his liberty by Edward White, Commissioner of Immigration for the Port of San Francisco, at the Immigration Station at Angel Island, County

^{*}Page-number appearing at foot of page of original certified Transcript of Record.

of Marin, State and Northern District of California, Southern Division thereof; that the said imprisonment, detention, confinement and restraint are illegal, and that the illegality thereof consists in this, to wit:

That it is claimed by the said commissioner that the said detained are Chinese persons and aliens not subject or entitled to admission into the United States under the terms and provisions of the Acts of Congress of May 6th, 1882, July 5th, 1884, November 3d, 1893, and April 29th, 1902, as amended and re-enacted by Section 5 of the Deficiency Act of April 7th, 1904, which said acts are commonly known and referred to as the Chinese Exclusion or Restriction Acts; and that he, the said commissioner, [2] intends to deport the said detained away from and out of the United States to the Republic of China.

That the said commissioner claims that the said detained arrived at the Port of San Francisco on or about the 26th day of November, 1920, on the SS. "Tjikembang," and thereupon made application to enter the United States as the son of a native-born citizen thereof, and that the application of the said detained to enter the United States as a citizen thereof was denied by the said Commissioner of Immigration, and that an appeal was thereupon taken from the excluding decision of the said Commissioner of Immigration, to the Secretary of the Department of Labor, and that the said secretary thereafter dismissed the said appeal; that it is claimed by the said commissioner that in all

of the proceedings had herein the said detained was accorded a full and fair hearing; that the action of the said commissioner and the said secretary was taken and made by them in the proper exercise of the discretion committed to them by the statute in such cases made and provided, and in accordance with the regulations promulgated under the authority contained in said statutes.

But, on the contrary, your petitioner, on his information and belief, alleges that the hearing and proceedings had herein, and the action of the said commissioner, and the action of the said secretary was and is in excess of the authority committed to them by the said rules and regulations and by said statutes, and that the denial of the application of the said detained to enter the United States as the son of a native-born citizen thereof was and in an abuse of the authority committed to them by the said statutes in each of the following particulars hereinafter set forth: [3]

Your petitioner alleges upon his information and belief that the evidence presented before the immigration authorities upon the application of the said detained to enter the United States, which said evidence is now hereby referred to with the same force and effect as if set forth in full herein, was of such a conclusive kind and character establishing the birth of the father of the detained within the United States and hence showing the said detained to be the son of a native-born citizen thereof, and which said evidence was of such legal weight and sufficiency that it was an abuse of discretion on the

part of the said commissioner and the said secretary to deny the said detained the right to admission into the United States and instead thereof to refuse to be guided by said evidence, and the said adverse action of the said commissioner and the said secretary was, your petitioner alleges upon his information and belief, arrived at and was done in denying the said detained the fair hearing and consideration of his case to which he was entitled. Said action was done in excess of the discretion committed to the said secretary and to the said Commissioner of Immigration. And your petitioner further alleges upon his information and belief, that the said action of the said secretary and the said commissioner was influenced against the said detained and against his witnesses solely because of their being of the Chinese race.

That your petitioner has not in his possession any part or parts of the said proceedings had before the said commissioner and the said Secretary of Labor for the reason that your petitioner has just received telegraphic advice of the dismissal of the said appeal, and the copy of the said records, formerly in the possession of the attorney for the said detained, is now [4] in the mails en route from Washington, D. C., to San Francisco; and it is for said reason impossible for your petitioner to annex hereto any part or parts of said immigration records; but your petitioner alleges his willingness to incorporate, and have considered as part and parcel of his petition, the said immigration record when the same shall have been received from the

Secretary of Labor, at Washington, and shall have it presented to this Court at the hearing to be had thereon.

That it is the intention of the said commissioner to deport the said detained out of the United States and away from the land of which he is a citizen by the SS. "Tjisondari," sailing from the port of San Francisco upon the 2d day of April, 1921, at 1 P. M., and unless this Court intervenes to prevent said deportation, the said detained will be deprived of residence within the land of his birth.

That the said detained is in detention as aforesaid, and for said reason is unable to verify this said petition upon his own behalf, and for said reason petition is verified by your petitioner, but for and as the act of the said detained.

WHEREFORE, your petitioner prays that a writ of habeas corpus issue herein as prayed for, directed to the said commissioner, commanding and directing him to hold the body of the said detained within the jurisdiction of this Court, and to present the body of the said detained before this Court at a time and place to be specified in said order, together with the time and cause of his detention, so that the same may be inquired into to the end that the said detained may be restored to his liberty and go hence without day. [5]

(Chinese Characters) GONG BING.

Dated: San Francisco, Calif., April 1st, 1921. GEO. A. McCOWAN,

> Attorney for Petitioner, Bank of Italy Bldg., San Francisco, California. [6]

United States of America, State and Northern District of California, City and County of San Francisco,—ss.

The undersigned, being first duly sworn, deposes and says: That he is the petitioner named in the foregoing petition; that the same has been read and explained to him and he knows the contents thereof; that the same is true of his own knowledge except as to those matters which are herein stated on his information and belief, and as to those matters he believes it to be true.

(Chinese Characters) GONG BING.

Subscribed and sworn to before me this 1st day of April, 1921.

[Seal] R. H. JONES,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Apr. 1, 1921. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [7]

In the Southern Division of the United States District Court in and for the Northern District of California, First Division.

No. 17,157.

In the Matter of GONG SIC OR (19729/32-2 Ex. SS. "Tjikembang" 11/26/20), on Habeas Corpus.

Order to Show Cause.

Good cause appearing therefor, and upon reading the verified petition on file herein,—

IT IS HEREBY ORDERED that Edward White, Commissioner of Immigration for the Port of San Francisco, appear before this court on the 9th day of April, 1921, at the hour of 10 o'clock A. M. of said day, to show cause, if any he has, why a writ of habeas corpus should not be issued as herein prayed for; and that a copy of this order be served upon the said commissioner.

AND IT IS FURTHER ORDERED that the said Edward White, Commissioner of Immigration as aforesaid, or whoever, acting under the orders of the said commissioner or the Secretary of Labor, shall have the custody of the said Gong Sic Or, are hereby ordered and directed to retain the said Gong Sic Or within the custody of the said Commissioner of Immigration, and within the jurisdiction of this court until its further order herein.

Dated, San Francisco, California, April 1st, 1921.

WM. H. HUNT,

United States District Judge.

[Endorsed]: Filed Apr. 1, 1921. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [8] In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 17,157.

In the Matter of GONG SIC OR, on Habeas Corpus.

Demurrer to Petition for Writ of Habeas Corpus.

Comes now the respondent, Edward White, Commissioner of Immigration, at the Port of San Francisco, in the Southern Division of the Northern District of California, and demurs to the petition for a writ of habeas corpus in the above-entitled cause, and for grounds of demurrer alleges:

I.

That the said petition does not state facts sufficient to entitle the petitioner to the issuance of a writ of habeas corpus, or for any relief thereon.

II.

That said petition is insufficient in that the statements therein relative to the record of the testimony taken on the trial of the said applicant are conclusions of law and not statements of the ultimate facts.

WHEREFORE, respondent prays that the writ of habeas corpus be denied.

FRANK M. SILVA,
United States Attorney,
BEN. F. GEIS,
Asst. United States Attorney,
Attorneys for Respondent.

[Endorsed]: Filed May 28, 1921. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [9]

At a stated term of the District Court of the United States, for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, State of California, on Saturday, the twenty-eighth day of May, in the year of our Lord one thousand nine hundred and twenty-one. Present: The Honorable, MAURICE T. DOOLING, Judge.

No. 17,157.

In the Matter of GONG SIC OR, on Habeas Corpus.

Minutes of Court—May 28, 1921—Hearing on Demurrer.

This matter came on regularly this day for hearing of order to show cause as to issuance of a writ of habeas corpus herein. Geo. A. McGowan, Esq., was present as attorney for petitioner and detained. P. A. Robbins, Esq., was present for and on behalf of respondent, and filed demurrer to petition and also presented the immigration records, which, after hearing Mr. McGowan, the Court ordered filed as Respondent's Exhibits "A," "B" and "C," and that same be considered as part of the original petition. After argument by respective attorneys, the Court ordered said matter submitted. [10]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 17,157.

In the Matter of GONG SIC OR, on Habeas Corpus.

(Order Sustaining Demurrer to Petition for Writ of Habeas Corpus.)

GEORGE A. McGOWAN, Esq., Attorney for Petitioner.

FRANK M. SILVA, Esq., United States Attorney, and BEN. F. GEIS, Esq., Assistant United States Attorney, Attorneys for Respondent.

ON DEMURRER TO PETITION FOR WRIT OF HABEAS CORPUS.

The demurrer to the petition for a writ of habeas corpus herein is sustained and the petition denied.

June 27th, 1921.

M. T. DOOLING, Judge.

[Endorsed]: Filed Jun. 27, 1921. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk [11] In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 17,157.

In the Matter of GONG SIC OR (19729/32-2 Ex. SS. "Tjikembang" Nov. 26, 1920), on Habeas Corpus,

Notice of Appeal.

To the Clerk of the Above-entitled Court and to the Hon. FRANK SILVA, United States Attorney for the Northern District of California:

You and each of you will please take notice that Gong Sic Or, the petitioner and the detained above named, does hereby appeal to the Circuit Court of Appeals of the United States for the Ninth Circuit thereof, from the order and judgment made and entered herein on the 27th day of October, A. D. 1920, sustaining the demurrer to and in denying the petition for a writ of habeas corpus filed herein.

Dated at San Francisco, California, July 1st, 1921. GEO. A. McGOWAN,

Attorney for Petitioner and Appellant Herein. [12]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 17,157.

In the Matter of GONG SIC OR (19729/32-2 Ex, SS. "Tjikembang," Nov. 26, 1920), on Habeas Corpus.

Petition for Appeal.

Now comes Gong Sic Or, the petitioner, the detained and the appellant herein, and says:

That on the 27th day of October, 1920, the aboveentitled Court made and entered its order denying the petition for a writ of habeas corpus, as prayed for, on file herein, in which said order in the aboveentitled cause certain errors were made to the prejudice of the appellant herein, all of which will more fully appear from the assignment of errors filed herewith.

WHEREFORE, this appellant prays that an appeal may be granted in his behalf to the Circuit Court of Appeals of the United Staes, for the Ninth Circuit thereof, for the correction of the errors so complained of, and further, that a transcript of the record, proceedings and papers in the above-entitled cause, as shown by the praecipe, duly authenticated, may be sent and transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit thereof; and further, that the said detained may remain upon bail during the pendency of the appeal herein, upon the bond previously

given before a commissioner of this court, in the sum of one thousand dollars conditioned that he will return and surrender himself in execution of whatever judgment may be finally entered herein.

Dated at San Francisco, California, July 1st, 1921.

GEO. A. McGOWAN,

Attorney for the Petitioner and Appellant Herein. [13]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 17,157.

In the Matter of GONG SIC OR (19729/32 Ex. SS. "Tjikembang" Nov. 26, 1920), on Habeas Corpus.

Assignment of Errors.

Comes now Gong Sic Or, by his attorney, Geo. A. McGowan, Esq., in connection with his petition for an appeal herein, assign the following errors which he avers occurred upon the trial or hearing of the above-entitled cause, and upon which he will rely, upon appeal to the Circuit Court of Appeals, for the Ninth Circuit, to wit:

FIRST. That the Court erred in sustaining the demurrer to, and in denying the petition for a writ of habeas corpus herein.

SECOND. That the Court erred in holding that it had no jurisdiction to issue a writ of habeas corpus, as prayed for in the petition herein.

THIRD. That the Court erred in sustaining the demurrer and in denying the petition of habeas corpus herein and remanding the petitioner to the custody of the immigration authorities for deportation.

FOURTH. That the Court erred in holding that the allegations contained in the petition herein for a writ of habeas corpus and the facts presented upon the issue made and joined herein were insufficient in law to justify the discharge of the petitioner from custody as prayed for in said petition. [14]

FIFTH. That the judgment made and entered herein is contrary to law.

SIXTH. That the judgment made and entered herein is not supported by the evidence.

SEVENTH. That the judgment made and entered herein is contrary to the evidence.

WHEREFORE, the appellant prays that the judgment and order the Southern Division of the United States District Court for the Northern District of the State of California, First Division, made and entered herein in the office of the Clerk of the said Court on the 27th day of October, 1920, discharging the order to show cause, sustaining the demurrer and in denying the petition for a writ of habeas corpus, be reversed, and that this cause be remitted to the said lower court with instructions to discharge the said Gong Sic Or from

custody, or grant him a new trial before the lower court, by directing the issuance of the writ of habeas corpus as prayed for in said petition.

Dated at San Francisco, California, July 1st, 1921.

GEO. A. McGOWAN,

Attorney for Petitioner and Appellant.

[Endorsed]: Receipt of a copy of the within notice of and petition for allowance of an appeal and assignment of errors admitted July 2, 1921.

FRANK M. SILVA,

U. S. Atty.

Filed July 2, 1921. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk. [15]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 17,157.

In the Matter of GONG SIC OR (19729/32-2 Ex. SS. "Tjikembang" Nov. 26, 1920), on Habeas Corpus.

Order Allowing Petition for Appeal (and Releasing on Bond).

On this 2d day of July, 1921, comes Gong Sic Or, the detained herein, by his attorney, Geo. A. Mc-Gowan, Esq., and having previously filed herein, did present to this Court, his petition praying for the allowance of an appeal to the United States Circuit Court of Appeals for the Ninth Circuit

intended to be urged and prosecuted by him, and praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had in the premises as may seem proper.

ON CONSIDERATION WHEREOF, the Court hereby allows the appeal herein prayed for, and orders execution and remand stayed pending the hearing of the said case in the United States Circuit Court of Appeals for the Ninth Circuit, that the appellant may remain at large upon bond in the sum of One Thousand Dollars (\$1000.00), previously given and accepted herein, and that he remain within the United States, and render himself in execution of whatever judgment is finally entered herein at the termination of said appeal.

Dated at San Francisco, California, July 2d, 1921.

M. T. DOOLING,

United States District Judge. [16]

[Endorsed]: Receipt of a copy of the within order is hereby admitted this 2d day of July, 1921.

FRANK M. SILVA,

U. S. Atty.

Filed July 2, 1921. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk. [17]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 17,157.

In the Matter of GONG SIC OR (19729/32-2 Ex. SS. "Tjikembang," November 26, 1920)—on Habeas Corpus.

Stipulation and Order Respecting Withdrawal of Immigration Record.

It is hereby stipulated and agreed by and between the attorney for the petitioner and appellant herein and the attorney for the respondent and appellee herein, that the original immigration record in evidence and considered as part and parcel of the petition for a writ of habeas corpus upon hearing of the demurrer in the above-entitled matter, may be withdrawn from the files of the Clerk of the above-entitled court and filed with the Clerk of the United States Circuit Court of Appeals in and for the Ninth Circuit, there to be considered as a part and parcel of the record on appeal in the above-entitled case with the same force and effect as if embodied in the transcript of the record, and so certified to by the clerk of the court.

Dated: San Francisco, California, August 26th, 1921.

FRANK M. SILVA,
Attorney for Respondent and Appellee.
JOSEPH P. FALLON,

Attorney for Petitioner and Appellant. [18]

Upon reading and filing the foregoing stipulation, it is hereby ordered that the said immigration record therein referred to may be withdrawn from the office of the clerk of this court and filed in the office of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, said withdrawal to be made at the time the record on appeal herein is certified to by this Court.

Dated: San Francisco, California, August 26th, 1921.

FRANK H. RUDKIN,

United States District Judge.

[Endorsed]: Filed Aug. 27, 1921. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [19]

Certificate of Clerk U. S. District Court to Transcript on Appeal.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 19 pages, numbered from 1 to 19, inclusive, contain a full, true, and correct transcript of certain records and proceedings in the Matter of Gong Sic Or, on Habeas Corpus, No. 17,157, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the praecipe for transcript on appeal, and the instructions of the attorney for petitioner and appellant herein.

I further certify that the cost for preparing and certifying the foregoing transcript on appeal is the sum of Seven Dollars and Fifteen Cents (\$7.15), and that the same has been paid to me by the attorney for the appellant herein.

Annexed hereto is the original citation on appeal issued herein (page 21).

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 17th day of September, A. D. 1921.

[Seal]

WALTER B. MALING,

Clerk.

By C. M. Taylor, Deputy Clerk. [20]

Citation.

UNITED STATES OF AMERICA,—ss.

The President of the United States, to EDWARD WHITE, Commissioner of Immigration, Port of San Francisco, and FRANK M. SILVA, United States Attorney, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the clerk's office of the United States District Court for the Northern District of California, Southern Division, wherein Gong Sic Or is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be cor-

rected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable FRANK H. RUD-KIN, United States District Judge for the Northern District of California, this 27th day of August, A. D. 1921.

FRANK H. RUDKIN,

United States District Judge. [21]

Receipt of a copy of the within is hereby acknowledged this 27th day of August, 1921.

FRANK M. SILVA,

Atty. for Appellee.

[Endorsed]: No. 17,157. United States District Court for the Northern District of California. Gong Sic Or, Appellant, vs. Edward White, Commissioner of Immigration, Appellee. Citation on Appeal. Filed Aug. 27, 1921. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

[Endorsed]: No. 3774. United States Circuit Court of Appeals for the Ninth Circuit. Gong Sic Or, Appellant, vs. Edward White, as Commissioner of Immigration, Port of San Francisco, Appellee. Transcript of Record. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Filed September 17, 1921.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien, Deputy Clerk.

Certificate of Clerk U. S. District Court to Original Exhibits.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the accompanying exhibits (three in number) known as, and marked: Respondent's Exhibit "A" (Immigration Records) Respondent's Exhibit "B" "

Respondent's Exhibit "C" "

are the original exhibits introduced and filed in

—are the original exhibits introduced and filed in the Matter of Gong Sic Or, on Habeas Corpus, No. 17,157, and are transmitted herewith in accordance with a stipulation and order of this Court.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 17th day of September, A. D. 1921.

[Seal] WALTER B. MALING,

Clerk.

By C. M. Taylor, Deputy Clerk.

[Endorsed]: No. 17,157. In the Southern Division of the U. S. District Court, Northern District of California, First Division. In the Matter of Gong Sic Or on Habeas Corpus. Certificate of Clerk U. S. District Court to Original Exhibits.

No. 3774. United States Circuit Court of Appeals for the Ninth Circuit. Filed Sept. 19, 1921. F. D. Monckton, Clerk.

No. 3774

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

Gong Sic Or,

Appellant,

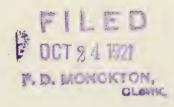
VS.

Edward White, as Commissioner of Immigration, Port of San Francisco,

Appellee.

BRIEF FOR APPELLANT.

Joseph P. Fallon, Attorney for Appellant.





IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GONG SIC OR,

Appellant,

VS.

EDWARD WHITE, as Commissioner of Immigration, Port of San Francisco,

Appellee.

BRIEF FOR APPELLANT.

STATEMENT OF FACTS.

This is an appeal from the judgment of the United States District Court for the Southern Division of the Northern District of California, First Division, made and entered on the 27th day of June, 1921, sustaining the demurrer interposed to appellant's petition for a writ of habeas corpus.

Gong Sic Or is a Chinese person who arrived at the port of San Francisco on the 26th day of November, 1920, and made application to enter the United States as the foreign born son of Gong Bing Gow, a native born citizen of the United States, He was denied admission after a hearing before a Board of Special Inquiry from whose decision an appeal was taken to the Secretary of Labor at Washington, D. C., where the decision of said Board was affirmed and Gong Sic Or ordered deported (page 46).

The citizenship of the father, Gong Bing Gow, is not questioned but the appellant is denied admission solely upon the ground that the relationship of father and son has not been established to the satisfaction of the Immigration Officials (page 43).

UNFAIRNESS OF HEARING.

It is our contention that the hearing accorded the appellant was unfair in that the Secretary of Labor, after sweeping aside as immaterial and inconsequential all the alleged discrepancies pointed out by the Board of Special Inquiry and affirmed by said Board of Special Inquiry as sufficiently material upon which to base a denial of relationship, proceeded to deny the appellant's right to enter upon the ground that the appellant knew nothing of an epidemic that the father stated had occurred in the home village and which resulted in the deaths of many persons.

The decision of the Secretary of Labor is found on page 46 of the record and reads as follows:

"After oral hearing the dismissal of appeal ordered above is affirmed. The discrepancy re-

garding the epidemic and deaths appears to me conclusive.

March 3, 1921.

(Sgd.)

Louis F. Post, Assistant Secretary."

If this point was so important, the matter should have been given more attention by the Board of Special Inquiry. In its examination on this point (page 16) held on the 27th day of December, 1921, the father was questioned as follows:

"Q. Were there any deaths in your village when you were last there?

A. Yes, many deaths that year.

Q. Name some of the Chinese who died whom your son would be apt to know about?

A. Gong Sue Meng and many other young people whose names I do not know.

Q. What was the cause of many deaths?

A. Epidemic."

At the examination of the appellant held on the 28th day of December, 1920, the appellant was examined as follows:

"Q. Has any member of your family been seriously sick?

A. No.

Q. Have there been many deaths in your village during recent years?

A. No.

Q. Do you know of any persons in your village who have died during the present year?

A. No."

It is manifestly unfair, if the point were so important, to have omitted asking the appellant if a man by the name of Gong Sue Meng had died. The

father was asked to name some person whom the son would be apt to know about (page 16). To omit asking him that question and to fail to elaborate upon the point in order to ascertain that fact was decidedly unfair to the appellant. We respectfully request that the order of the District Court denying the issuance of a writ of habeas corpus be reversed and that the writ of habeas corpus issue as prayed for.

Dated, San Francisco, October 22, 1921.

> Joseph P. Fallon, Attorney for Appellant.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GONG SIC OR,

Appellant,

VS.

EDWARD WHITE, as Commissioner of Immigration for the Port of San Francisco,

Appellee.

BRIEF OF APPELLEE

JOHN T. WILLIAMS, United States Attorney,

BEN F. GEIS,

Assistant United States Attorney,

Attorneys for Appellee.



No. 3774

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GONG SIC OR,

Appellant,

VS.

EDWARD WHITE, as Commissioner of Immigration for the Port of San Francisco,

Appellee.

BRIEF OF APPELLEE

STATEMENT OF FACTS

Gong Sic Or, appellant herein, arrived at the Port of San Francisco on the S. S. "Tjikenbang" November 26, 1920 (Ex. A, p. 39), and thereupon made application to enter the United States as a citizen thereof, claiming to be the foreign-born son of Bing Gon, a citizen, who accompanied him (Ex. B, p. 44).

His application for admission was denied by a board of special inquiry and upon appeal to the Secretary of Labor was dismissed.

Thereafter petition for writ of habeas corpus (Tr. 2) was filed in the District Court and order to show cause issued (Tr. 8). A demurrer to the petition was filed (Tr. 9) which was sustained and the petition denied (Tr. 11). It is from the order and judgment of the Court below sustaining the demurrer and denying the petition that this appeal is taken.

ARGUMENT.

The usual allegations of unfairness in the conduct of the hearing by the immigration officials and abuse of discretion on the part of said officials in reaching their conclusions appear in the petition.

DOES THE RECORD IN THE CASE SHOW THAT THE HEARING WAS MANIFESTLY UNFAIR?

It appears from the record that Gong Sie Or arrived at the Port of San Francisco November 26, 1920 (Ex. A, p. 39), accompanied by his alleged father Bing Gon (Ex. B, p. 44), and thereupon made application to enter the United States as a citizen thereof, and in support of his said application presented the affidavit of his alleged father Bing Gon, to which was attached the photographs of the applicant and his alleged father (Ex. A, p. 2), together with the affidavit of Gong Jack, bear-

ing a photograph of affiant (Ex. A, p. 1), who was to appear as a witness in the case.

On December 27, 1920, the testimony of Bing Gon (Ex. A, p. 19), Gong Sic Or (Ex. A, p. 13) and Gong Jack (Ex. A, p. 8) was taken in shorthand before a board of special inquiry and transcribed in typewriting and made a part of the immigration record.

On December 28, 1920, Gong Sic Or was further examined before the board and his testimony made a part of the record (Ex. A, p. 24).

At the conclusion of the hearing, the board of special inquiry, not being satisfied that the relationship claimed had been satisfactorily established, voted to defer for a period of ten days for the production of additional evidence (Ex. A, p. 20), and the attorney of record was so notified in writing (Ex. A, p. 26).

On January 3, 1921, the attorney of record advised in writing that "no further evidence will be introduced in the above-named case. Therefore I ask that final action be taken." (Ex. A, p. 28).

On January 11, 1921, the board of special inquiry, after a careful consideration of the evidence (Ex. A, p. 32), found Gong Sic Or not to be the son of Gong Bing Gon, and voted that he be denied admission and so notified the applicant and advised him of his right of appeal (Ex. A, p. 29).

On June 12, 1921, the attorney of record and

the Consul General for China were notified of the board's excluding decision and of their right of appeal (Ex. A, pp. 34, 35).

Notice of appeal was filed January 13, 1921 (Ex. A, p. 36), and the attorney of record was given full opportunity to review the entire record, including exhibits, as appears from his receipt therefor (Ex. A, p. 38).

The entire record, including exhibits, was forwarded to the Secretary of Labor on appeal February 4, 1921 (Ex. A, p. 40), and appellant was represented before the Department in Washington, D. C., by Messrs. Bouve & Parker, attorneys at law (Exhibit A, pp. "A" and 41), who filed a brief in his behalf (Ex. A, p. 45) and who were also granted an oral hearing before the Secretary (Ex. A, p. 46).

The Secretary of Labor, after a careful review of all the evidence, dismissed the appeal and directed the applicant be deported (Ex. A, p. 47).

We have carefully examined the record in this case and failed to find anything therein justifying the charge of unfairness. Appellant was given an opportunity to present any and all witnesses he desired and all witnesses so presented were fully and fairly heard. Every jurisdictional step necessary to a fair hearing under the rules and regulations of the Department of Labor was taken.

The petition herein does not show nor does an inspection of the immigration records disclose

wherein petitioner was denied any substantial right to which he was entitled under either the laws or the rules and regulations in such cases made and provided. In the absence of such a showing the petition should be denied.

> Jeung Bock Hong vs. White, 258 Fed. 23. Chin Yow vs. United States, 208 U. S. 8.

DOES AN INSPECTION OF THE IMMIGRATION RECORDS HEREIN DISCLOSE A MANIFEST ABUSE OF DISCRETION?

The decision of the board of special inquiry denying the application of appellant is based upon discrepancies appearing in the testimony of Gong Sic Or and his alleged father Gong Bing Gon.

These discrepancies are fully set out in the immigration record commencing at page 32 of Exhibit Λ , with marginal notes showing the Exhibit and page where the testimony there referred to is to be found.

The reasons assigned for the dismissal of the appeal by the Secretary are fully set forth on pages 47 and 46 of Exhibit A.

It appears therefrom that the appeal was dismissed by the Secretary on March 1, 1921, after which an oral hearing was had and the previous order affirmed March 3, 1921.

There is nothing in the finding of the Secretary which in our opinion justifies the conclusion of counsel for appellant that the Secretary of Labor swept aside as immaterial or inconsequential all the discrepancies pointed out by the board and proceeded to deny the applicant's right to enter, upon the grounds that he knew nothing of an epidemic testified to by the alleged father.

Bing Gon, the alleged father, testified that he had made two trips to China; that he departed on his second trip May 10, 1919, on the S. S. "Nanking" and returned with the applicant (Ex. A, p. 19); that he did not do anything while in China on this visit; that he visited Canton and Hongkong but only stayed a couple of days (Ex. A, p. 18); that the applicant was at home awaiting him when he returned from the United States and did not return to school at all (Ex. A, p. 17).

Gong Sic Or testifies that his alleged father, after his return to China, spent most of his time visiting at home; that he made several trips to Hongkong and Canton, when he would be away about ten days (Ex. A, p. 12).

If appellant is the son of Bing Gon, as claimed, and was at home during the entire time his father was in China on his last visit, it is strange that he should know nothing of a serious epidemic which took place in his home village, during which many of the inhabitants died, and concerning which his father has testified.

Because of the discrepancies appearing in the record, the Secretary of Labor was called upon to exercise a discretion as to whether or not the applicant was entitled to admission. In the exercise of this discretion, which is committed to him by the statute, he has decided that appellant has not satisfactorily established his claim of relationship to his alleged father and therefore is not entitled to admission as a citizen of the United States. This opinion seems to have been honestly and impartially arrived at and does not in our opinion disclose any abuse of that discretion justifying the interference of the Court. In the recent case of Jeung Bock Hong vs. White, 258 Fed. 23, this Court speaking through his Honor, Morrow, Circuit Judge, said:

"The discrepancies in the testimony appear to be unimportant but if taking them altogether the executive officers of the Department found that the evidence in support of the petitioner's right to land and enter the United States was so impaired as to render it unsatisfactory, the Court is not authorized to reverse that conclusion."

"We cannot say that the proceedings were manifestly unfair or that the actions of the executive officers were such as to prevent a fair investigation or that there was a manifest abuse of the discretion committed to them by the statute. In such cases, the order of the executive officers within the authority of the statute is final."

In *Quock Ting* vs. *U. S.*, 140 U. S. 417, 420, 11 Sup. Ct. 733, 851, the court said.

"Undoubtedly, as a general rule, positive testimony as to a particular fact, uncontradicted by any one, should control the decision of the court; but that rule admits of many exceptions. There may be such an inherent improbability in the statements of a witness as to induce the court or jury to disregard his evidence, even in the absence of any direct conflicting testimony. He may be contradicted by the facts he states as completely as by direct adverse testimony; and there may be so many omissions in his account of particular transactions, or of his own conduct, as to discredit his whole story. His manner, too, of testifying may give rise to doubts of his sincerity, and create the impression that he is giving a wrong coloring to material facts. All these things may properly be considered in determining the weight which should be given to his statements, although there be no adverse verbal testimony adduced."

In conclusion we submit that the record in this case does not show that the hearing afforded the appellant herein was unfair or that there was a manifest abuse of discretion and therefore confidently urge and believe that the judgment of the Court below should be affirmed.

Respectfully submitted,

JOHN T. WILLIAMS,
United States Attorney,

BEN F. GEIS,
Assistant United States Attorney,
Attorneys for Appellee.

United States

Circuit Court of Appeals

For the Ninth Circuit.

CHING KAM SING,

Appellant,

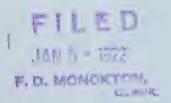
VS.

RICHARD L. HALSEY, as Immigration Inspector in Charge at the Port of Honolulu,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Territory of Hawaii.





United States

Circuit Court of Appeals

For the Ninth Circuit.

CHING KAM SING,

Appellant,

VS.

RICHARD L. HALSEY, as Immigration Inspector in Charge at the Port of Honolulu,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Territory of Hawaii.



INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

P	age
Assignment of Errors	88
Bond on Appeal	90
Certificate of Clerk U. S. District Court to	
Transcript of Record	114
Citation on Appeal	112
Hearing	82
Hearing (Continued)	82
Judgment	85
Minutes of Court—December 9, 1919—Hearing	82
Minutes of Court—February 13, 1920—Hearing	
Continued	82
Minutes of Court—March 5, 1920—Hearing	
Continued	83
Minutes of Court—July 30, 1920—Hearing	
Continued	84
Names and Addresses of Attorneys of Record	1
Notice of Filing of Bond on Appeal	94
Order Allowing Appeal	93

Index.	Page
Order Extending Time to and Including Sep-	-
tember 29, 1920, to Transmit Record on Ap-	-
peal	3
Order Extending Time to and Including Oc-	NO.
tober 29, 1920, to Transmit Record on Ap-	-
peal	4
Order Extending Time to and Including No-	-
vember 27, 1920, to Transmit Record or	1
Appeal	5
Order Extending Time to and Including Decem-	-
ber 27, 1920, to Transmit Record on Ap-	-
neal	6
Order Extending Time to and Including Janu-	-
ary 26, 1921, to Transmit Record on Ap-	-
peal	. 7
Order Extending Time to and Including Febru-	-
ary 25, 1921, to Transmit Record on Appea	ıl 8
Order Extending Time to and Including March	ı
26, 1921 to Transmit Record on Appeal	. 9
Order Extending Time to and Including Apri	1
25, 1921, to Transmit Record on Appeal	. 10
Order Extending Time to and Including May	ÿ
25, 1921, to Transmit Record on Appeal	. 12
Order Extending Time to and Including June	e
24, 1921, to Transmit Record on Appeal	. 13
Order Extending Time to and Including July	7
24, 1921, to Transmit Record on Appeal	. 14
Order Extending Time to and Including Augus	t
23, 1921, to Transmit Record on Appeal	. 15
Order to Show Cause	. 74

vs. Richard L. Halsey.	iii
Index.	Page
Petition for Appeal	86
Petition for Writ of Habeas Corpus	. 17
Praecipe for Transcript of Record	. 113
Return of Richard L. Halsey, Respondent, to	
Order to Show Cause	. 76
Statement	. 1
Stinulation	96



Names and Addresses of Attorneys of Record.

For Petitioner, CHING YAM SING: WATSON & CLEMONS, Honolulu, Hawaii.

For RICHARD L. HALSEY, Esq., Respondent:
S. C. HUBER, Esq., United States Attorney,
N. D. GODBOLD, Esq., Assistant United
States Attorney, Honolulu, Hawaii. [1*]

In the District Court of the United States in and for the District and Territory of Hawaii.

No. 152.

In the Matter of the Application of CHING YAM SING for a Writ of Habeas Corpus in Behalf of LEE WAH LEONG and LEE WAH KI.

Statement.

December 4, 1919: Verified petition for writ of habeas corpus filed and order to show cause issued. Acceptance of service by U. S. Attorney for respondent, R. L. Halsey.

NAMES OF ORIGINAL PARTIES. CHING YAM SING, Petitioner. RICHARD L. HALSEY, Respondent.

DATES OF FILING OF THE PLEADINGS.

December 4, 1919: Petition.

December 8, 1919: Return of respondent.

^{*}Page-number appearing at foot of page of original certified Transcript of Record.

ISSUANCE OF PROCESS:

December 4, 1919: Order to show cause.

January 26, 1920: Writ of habeas corpus.

Acceptance of service as to above by U. S. Attorney.

HEARINGS:

December 9, 1919: Hearing on return to order to show cause.

February 13, 1920: Hearing, testimony taken.

March 5, 1920: Further hearing, cause submitted.

July 30, 1920: Proceedings at decision.

Hearings had before J. B. Poindexter and Horace W. Vaughan, Presiding Judges. [2]

July 31, 1920: Judgment filed and entered.

July 31, 1920: Petition for appeal and order allowing same filed.

United States of America, District of Hawaii,—ss.

I, Wm. L. Rosa, clerk of the United States District Court for the Territory of Hawaii, do hereby certify the foregoing to be a full, true and correct statement showing the time of commencement of the above-entitled suit; the names of the original parties thereto; the several dates when the respective pleadings were filed; and account of the proceedings showing the service of the order to show cause, writ and habeas corpus and the time when the judgment herein was rendered and the Judge rendering same, in the matter of the application of Ching Yam Sing for a writ of habeas corpus in behalf of Lee Wah

Leong and Lee Wah Ki, Number 152, in the United States District Court for the Territory of Hawaii.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 10th day of August, A. D. 1921.

[Seal] WM. L. ROSA,

Clerk, United States District Court, Territory of Hawaii. [3]

In the United States District Court for the Territory of Hawaii.

In the Matter of the Application of CHING YAM SING for a Writ of Habeas Corpus in Behalf of LEE WAH LEONG and LEE WAH KI.

Order Extending Time to and Including September 29, 1920, to Transmit Record on Appeal.

On this 30th day of August, 1920, it appearing that it is impracticable for the Clerk of this court to prepare and transmit to the Clerk of the Ninth Circuit Court of Appeals at San Francisco, California, the transcript of record on appeal and on assignment of errors in the above-entitled cause, within the time limited therefor by the citation issued herein,—

It is ORDERED that the time within which the Clerk of this court shall prepare and transmit said transcript, together with said assignment of errors and all papers required by the praecipe of plaintiff in error herein, to the Clerk of said Court of Appeals, be, and it is hereby extended to September 29, 1920.

Honolulu, August 30, 1920.

J. B. POINDEXTER,

Judge, United States District Court, Territory of Hawaii.

Filed Aug. 30, '20. A. E. Harris, Clerk. By Wm. L. Rosa, Deputy. [4]

In the United States District Court for the Territory of Hawaii.

In the Matter of the Application of CHING YAM SING for a Writ of Habeas Corpus in Behalf of LEE WAH LEONG and LEE WAH KI.

Order Extending Time to and Including October 29, 1920, to Transmit Record on Appeal.

On this 29th day of September, 1920, it appearing that it is impracticable for the Clerk of this court to prepare and transmit to the Clerk of the Ninth Circuit Court of Appeals at San Francisco, California, the transcript of record on appeal and on assignment of errors in the above-entitled cause, within the time limited therefor by the citation issued herein,—

It is ORDERED that the time within which the Clerk of this court shall prepare and transmit said transcript, together with said assignment of errors and all papers required by the praecipe of plaintiff in error herein, to the Clerk of said Court of Appeals, be, and it is hereby extended to October 29, 1920.

Honolulu, September 29, 1920.

J. B. POINDEXTER,

Judge, United States District Court, Territory of Hawaii.

Filed Sept. 29, '20. A. E. Harris, Clerk. By Wm. L. Rosa, Deputy. [5]

In the United States District Court for the Territory of Hawaii.

In the Matter of the Application of CHING YAM SING for a Writ of Habeas Corpus in Behalf of LEE WAH LEONG and LEE WAH KI.

Order Extending Time to and Including November 27, 1920, to Transmit Record on Appeal.

On this 29th day of October, 1920, it appearing that it is impracticable for the Clerk of this court to prepare and transmit to the Clerk of the Ninth Circuit Court of Appeals at San Francisco, California, the transcript of record on appeal and on assignment of errors in the above-entitled cause, within the time limited therefor by the citation issued herein,—

It is ORDERED that the time within which the Clerk of this court shall prepare and transmit said transcript, together with said assignment of errors and all papers required by the praecipe of plaintiff in error herein, to the Clerk of said Court of Appeals, be, and it is hereby extended to November 27, 1920.

Honolulu, October 29, 1920.

J. B. POINDEXTER,

Judge, United States District Court, Territory of Hawaii.

Filed Oct. 29, '20. A. E. Harris, Clerk. By Wm. L. Rosa, Deputy. [6]

In the United States District Court for the Territory of Hawaii.

In the Matter of the Application of CHING YAM SING for a Writ of Habeas Corpus in Behalf of LEE WAH LEONG and LEE WAH KI.

Order Extending Time to and Including December 27, 1920, to Transmit Record on Appeal.

On this 27th day of November, 1920, it appearing that it is impracticable for the Clerk of this court to prepare and transmit to the Clerk of the Ninth Circuit Court of Appeals at San Francisco, California, the transcript of record on appeal and on assignment of errors in the above-entitled cause,

within the time limited therefor by the citation issued herein,—

It is ORDERED that the time within which the Clerk of this court shall prepare and transmit said transcript, together with said assignment of errors and all papers required by the praecipe of plaintiff in error herein, to the Clerk of said Court of Appeals be, and it is hereby extended to December 27, 1920.

Honolulu, November 27, 1920.

J. B. POINDEXTER,

Judge, United States District Court, Territory of Hawaii.

Filed Nov. 27, '20. A. E. Harris, Clerk. By Wm. L. Rosa, Deputy. [7]

In the United States District Court for the Territory of Hawaii.

In the Matter of the Application of CHING YAM SING for a Writ of Habeas Corpus in Behalf of LEE WAH LEONG and LEE WAH KI.

Order Extending Time to and Including January 26, 1921, to Transmit Record on Appeal.

On this 27th day of December, 1920, it appearing that it is impracticable for the Clerk of this court to prepare and transmit to the Clerk of the Ninth Circuit Court of Appeals at San Francisco, California, the transcript of record on appeal and on assignment of errors in the above-entitled cause, within the time limited therefor by the citation issued herein,—

It is ORDERED that the time within which the Clerk of this court shall prepare and transmit said transcript, together with said assignment of errors and all papers required by the praecipe of plaintiff in error herein, to the Clerk of said Court of Appeals, be, and it is hereby extended to January 26, 1921.

Honolulu, December 27, 1920.

J. B. POINDEXTER,

Judge, United States District Court, Territory of Hawaii.

Filed Dec. 27, '20. A, E. Harris, Clerk. By Wm. L. Rosa, Deputy. [8]

In the United States District Court for the Territory of Hawaii.

In the Matter of the Application of CHING YAM SING for a Writ of Habeas Corpus in Behalf of LEE WAH LEONG and LEE WAH KI.

Order Extending Time to and Including February 25, 1921, to Transmit Record on Appeal.

On this 26th day of January, 1921, it appearing that it is impracticable for the Clerk of this court

to prepare and transmit to the Clerk of the Ninth Circuit Court of Appeals at San Francisco, California, the transcript of record on appeal and on assignment of errors in the above-entitled cause, within the time limited therefor by the citation issued herein,—

It is ORDERED that the time within which the Clerk of this court shall prepare and transmit said transcript, together with said assignment of errors and all papers required by the praecipe of plaintiff in error herein, to the Clerk of said Court of Appeals, be, and it is hereby extended to February 25, 1921.

Honolulu, January 26, 1921.

J. B. POINDEXTER,

Judge, United States District Court, Territory of Hawaii.

Filed Jany. 26, '21. A. E. Harris, Clerk. By Wm. L. Rosa, Deputy. [9]

- In the United States District Court for the Territory of Hawaii.
- In the Matter of the Application of CHING YAM SING for a Writ of Habeas Corpus in Behalf of LEE WAH LEONG and LEE WAH KI.
- Order Extending Time to and Including March 26, 1921, to Transmit Record on Appeal.

On this 25th day of February, 1921, it appearing

that it is impracticable for the Clerk of this court to prepare and transmit to the Clerk of the Ninth Circuit Court of Appeals at San Francisco, California, the transcript of record on appeal and on assignment of errors in the above-entitled cause, within the time limited therefor by the citation issued herein,—

It is ORDERED that the time within which the Clerk of this court shall prepare and transmit said transcript, together with said assignment of errors and all papers required by the praecipe of plaintiff in error herein, to the Clerk of said Court of Appeals, be, and it is hereby extended to March 26, 1921.

Honolulu, February 25, 1921.

J. B. POINDEXTER,

Judge, United States District Court, Territory of Hawaii.

Filed Feby. 25, '21. A. E. Harris, Clerk. By Wm. L. Rosa, Deputy. [10]

- In the United States District Court for the Territory of Hawaii.
- In the Matter of the Application of CHING YAM SING for a Writ of Habeas Corpus in Behalf of LEE WAH LEONG and LEE WAH KI.
- Order Extending Time to and Including April 25, 1921, to Transmit Record on Appeal.

On this 26th day of March, 1921, it appearing

that it is impracticable for the Clerk of this court to prepare and transmit to the Clerk of the Ninth Circuit Court of Appeals at San Francisco, California, the transcript of record on appeal and on assignment of errors in the above-entitled cause, within the time limited therefor by the citation issued herein,—

It is ORDERED that the time within which the Clerk of this court shall prepare and transmit said transcript, together with said assignment of errors and all papers required by the praecipe of plaintiff in error herein, to the Clerk of said Court of Appeals, be, and it is hereby extended to April 25, 1921.

Honolulu, March 26, 1921.

J. B. POINDEXTER,

Judge, United States District Court, Territory of Hawaii.

Filed Mar. 26, '21. A. E. Harris, Clerk. By Wm. L. Rosa, Deputy. [11]

In the United States District Court for the Territory of Hawaii.

In the Matter of the Application of CHING YAM SING for a Writ of Habeas Corpus in Behalf of LEE WAH LEONG and LEE WAH KI.

Order Extending Time to and Including May 25, 1921, to Transmit Record on Appeal.

On this 25th day of April, 1921, it appearing that it is impracticable for the Clerk of this court to prepare and transmit to the Clerk of the Ninth Circuit Court of Appeals at San Francisco, California, the transcript of record on appeal and on assignment of errors in the above-entitled cause, within the time limited therefor by the citation issued herein,—

It is ORDERED that the time within which the Clerk of this court shall prepare and transmit said transcript, together with said assignment of errors and all papers required by the praecipe of plaintiff in error herein, to the Clerk of said Court of Appeals, be, and it is hereby extended to May 25, 1921.

Honolulu, April 25, 1921.

J. B. POINDEXTER,

Judge, United States District Court, Territory of Hawaii.

Filed Apr. 25, '21. Wm. L. Rosa, Clerk. [12]

In the United States District Court for the Territory of Hawaii.

In the Matter of the Application of CHING YAM SING for a Writ of Habeas Corpus in Behalf of LEE WAH LEONG and LEE WAH KI.

Order Extending Time to and Including June 24, 1921, to Transmit Record on Appeal.

On this 25th day of May, 1921, it appearing that it is impracticable for the Clerk of this court to prepare and transmit to the Clerk of the Ninth Circuit Court of Appeals at San Francisco, California, the transcript of record on appeal and on assignment of errors in the above-entitled cause, within the time limited therefor by the citation issued herein,—

It is ORDERED that the time within which the Clerk of this court shall prepare and transmit said transcript, together with said assignment of errors and all papers required by the praecipe of plaintiff in error herein, to the Clerk of said Court of Appeals, be, and it is hereby extended to June 24, 1921.

Honolulu, May 25, 1921.

J. B. POINDEXTER,

Judge, United States District Court, Territory of Hawaii.

Filed May 25, '21. Wm. L. Rosa, Clerk. [13]

In the United States District Court for the Territory of Hawaii.

In the Matter of the Application of CHING YAM
SING for a Writ of Habeas Corpus in Behalf of LEE WAH LEONG and LEE WAH
KI.

Order Extending Time to and Including July 24, 1921, to Transmit Record on Appeal.

On this 24th day of June, 1921, it appearing and it is impracticable for the Clerk of this court to prepare and transmit to the Clerk of the Ninth Circuit Court of Appeals at San Francisco, California, the transcript of record on appeal and on assignment of errors in the above-entitled cause, within the time limited therefor by the citation issued herein,—

It is ORDERED that the time within which the Clerk of this court shall prepare and transmit said transcript, together with said assignment of errors and all papers required by the praecipe of plaintiff in error herein, to the Clerk of said Court of Appeals, be and it is hereby extended to July 24, 1921.

Honolulu, June 24, 1921.

J. B. POINDEXTER,

Judge, United States District Court, Territory of Hawaii.

Filed June 24, 1921. Wm. L. Rosa, Clerk. [14]

In the United States District Court for the Territory of Hawaii. In the Matter of the Application of Ching Yam Sing for a Writ of Habeas Corpus. Order Extending Time to Transmit Record on Appeal. Filed July 24, '21. Wm. L. Rosa, Clerk. [15]

In the United States District Court for the Territory of Hawaii.

In the Matter of the Application of CHING YAM SING for a Writ of Habeas Corpus in Behalf of LEE WAH LEONG and LEE WAH KI.

Order Extending Time to and Including August 23, 1921, to Transmit Record on Appeal.

Now, on this 24th day of July, 1921, it appearing from the representations of the Clerk of this Court that it is impracticable for said Clerk to prepare and transmit to the Clerk of the Ninth Circuit Court of Appeals, at San Francisco, California, the transcript of the record on assignment of error in the above-entitled cause, within the time limited therefor by the citation heretofore issued in this cause—

It is ORDERED that the time within which the Clerk of this Court shall prepare and transmit said transcript of the record on assignment of error in this cause, together with the said assignment of errors and all papers required by the praecipe of plaintiff in error herein, to the Clerk of the Ninth Circuit Court of Appeals, be, and the same is hereby extended to August 23, 1921.

Dated at Honolulu, Hawaii, July 24, 1921.

HORACE W. VAUGHAN,

Judge U. S. District Court, Hawaii. [16]

In the United States District Court for the Territory of Hawaii. In the Matter of the Application of Ching Yam Sing for a Writ of Habeas Corpus in Behalf of Lee Wah Leong and Lee Wah Ki. Petition. Filed Dec. 4, 1919, at 3 o'clock and 20 minutes P. M. A. E. Harris, Clerk. (Sgd.) Wm. L. Rosa, Deputy Clerk. Watson & Clemons, Attorneys for Applicant, 416–418 Kauikeolani Building, Honolulu, T. H.

Due and legal service of the above petition and of the order to show cause issued herein is hereby accepted and copies of said petition and order received.

Dated this 4th day of December, 1919.

RICHARD L. HALSEY,
Respondent.
By (Sgd.) S. C. HUBER,
U. S. Atty.,
His Atty. [17]

In the United States District Court for the Territory of Hawaii.

In the Matter of the Application of CHING YAM SING for a Writ of Habeas Corpus in Behalf of LEE WAH LEONG and LEE WAH KI.

Petition for Writ of Habeas Corpus.

To the Honorable HORACE W. VAUGHN, Judge of said Court:

The petition of Ching Yam Sing respectfully shows:

- 1. That he is a resident of Honolulu, City and County of Honolulu, Territory of Hawaii, and the friend of Lee Wah Leong and Lee Wah Ki hereinafter named, and makes this petition by and with their authority and on their behalf, and acting also for and on behalf of Lee Wah Koon, cousin and foster father of said Lee Wah Leong and Lee Wah Ki, said Lee Wah Koon being absent on the Island of Maui.
- 2. That said Lee Wah Leong and Lee Wah Ki are minors of the respective ages of 15 years and 14 years, and are American citizens, both born on the Island of Maui in said Territory.
- 3. That they are imprisoned and unlawfully and without authority of law restrained of their liberty by Richard L. Halsey, Esquire, Inspector in Charge of the United States Immigration Station at the Port of Honolulu aforesaid.
- 4. That said minors are not imprisoned or restrained of their liberty under any process, judgment, decree, or execution of any competent court or tribunal of civil or criminal jurisdiction. [18]
- 5. That the true cause or pretense of the imprisonment or restraint aforesaid is a certain order of a Board of Special Inquiry of said Immigration

Station made, to wit, October 6th, 1919, denying the said minors admission into the United States on the ground of failure of each of said minors to show his birth in Hawaii, as alleged, and a certain order of the Secretary of Labor of the United States of America thereafter made affirming said order of said Board.

- 6. That said order of said Board and of said Secretary of Labor was based upon a so-called hearing before said Board, but that said hearing was unfair, and was a mere semblance of a hearing.
- 7. That at said hearing each of said minors established a *prima facie* case of citizenship, and is therefore entitled to have the legality of his said detention and restraint determined by a judicial tribunal.
- 8. That the showing of each of said minors at said hearing was not only such as to establish a *prima facie* case, but was such that there was no reason to doubt the fact of his identity as the person born in Hawaii whom he claimed to be.
- 9. That the Immigration officers aforesaid were, among other grounds of unfairness apparent in the record on said hearing, which record is hereinafter referred to, unfair particularly in this, that they based their ruling aforesaid on alleged discrepancies which were trivial and inconsequential and on immaterial matters, and also on alleged discrepancies and uncertainties which were fairly explained away. [19]
 - 9. That said hearing before said Board was,

also, unfair, in that said Board based their adverse finding on the fact of the absence of any showing, in the passenger lists of departing steamers of the departure of said minors from Hawaii for China, which departure is and was claimed by said minors, but said Board did not make a full and complete search of such steamship records, as appears by reference to the Record aforesaid on pages 20 and 3 thereof, the testimony having been that said minors went to China in 1907 (Record, page 3), but the search of steamship records made by the Board covering only six months of that year (Record, page 20).

- 10. That from said adverse ruling of said Board, said minors appealed to the Secretary of Labor, who affirmed said ruling and thereby ratified the unfairness of said Board and failed to give to said minors a fair hearing of their alleged claims of citizenship.
- 11. That hereto annexed and made part hereof is a copy of said record, which is the record on which said appeal to the Secretary of Labor was taken.

WHEREFORE, the petitioner prays that a Writ of Habeas Corpus be issued out of this Honorable Court commanding the said Richard L. Halsey to have and produce the bodies of said minors before this Court at time and place as it may direct, and that as soon as allowable by law said minors may be enlarged upon bond in such amount as may be deemed resonable by your Honor.

Honolulu, December 4, 1919.

(Sgd.) CHING YAM SING,

Petitioner.

WATSON & CLEMONS,

416–418 Kauikeolani Building, Honolulu, T. H.

Attorneys for Petitioner. [20]

United States of America, Territory of Hawaii, City and County of Honolulu,—ss.

Ching Yam Sing, being first duly sworn on oath, deposes and says, that he is the petitioner herein, and that he has heard read the foregoing petition and that the same is true to the best of his knowledg, information and belief.

(Sgd.) CHING YAM SING.

Subscribed and sworn to before me this 4th day of December, A. D. 1919.

[Notarial Seal] (Sgd.) J. R. KENNY, Notary Public, First Judicial Circuit, Territory of Hawaii. [21]

U. S. IMMIGRATION SERVICE. No. 4382—598.

> Port of Honolulu, T. H., October 8, 1919.

Inspector in Charge,

U. S. Immigration Service,

Honolulu, T. H.

Having been denied admission to the United States by the Board of Special Inquiry, and being informed that we have the right of appeal from the excluding decision, we hereby give notice of our intention to avail ourselves of that right and do hereby appeal from the decision of the Board of Special Inquiry denying us admission to the Secretary of Labor.

(Sgd.) LEE WAH LEONG. (Sgd.) LEE WAH KI.

Let order to show cause why the writ of habeas corpus should not be granted as prayed for issue, returnable on the 9th day of December, A. D. 1919, at 10 o'clock A. M.

(Sgd.) HORACE W. VAUGHAN, Judge. [22]

4382/593.

U. S. IMMIGRATION SERVICE, PORT OF HONOLULU,

Т. Н.

RECORD OF BOARD OF SPECIAL INQUIRY
—CONVENED SEPTEMBER 11, 1919.

Members of Board: HARRY B. BROWN, Chairman; EDWIN FARMER and RICHARD L. HALSEY.

Cases of LEE WAH KI and LEE WAH LEONG, Alleged Hawaiian-born Chinese HK. 1, 2 & 4, ex SS. "SHINYO"—September 3, 1919.

Interpreter—HEE KWONG

Stenographer—MARTHA MULLHOLLAND.

Applicant presents two affidavits sworn to by Lee Wah Koon and Lee Dai Hoo on January 21, 1918,

to the effect that the two applicants were born in Hawaii. Pictures of the applicants are attached to said affidavits. The picture of Lee Wah Leong is not very good and is insufficient to identify him with any degree of certainty. The picture of Lee Wah Ki is a fairly good likeness of that applicant. Both pictures have been copied from some other pictures.

LEE WAH LEONG sworn testifies:

(By Inspector FARMER.)

- Q. What is your name and age?
- A. Lee Wah Leong, no other name; 14 years old by Chinese count.
 - Q. What was the date of your birth?
 - A. 6th month, 10th day, KS. 30 (July 22, 1904).
 - Q. Are you sure it was KS. 30? A. Yes.
- Q. Well, then, if that is the case, you are 16 by Chinese count now? A. I do not know.
- Q. Do you desire to have a friend or relative present at the hearing of your case? A. No.
 - Q. Where were you born? A. At Maui.
 - Q. Where on Maui? A. Kula.
 - Q. Where in Kula? A. I do not remember.
- Q. How do you know that you were born in Kula, Maui?
 - A. My aunt told me; that is the wife of my uncle.
 - Q. What is the name of your aunt?
 - A. Kan She.
 - Q. What is the name of your uncle, her husband?
 - A. Lee Wah Koon.

- Q. When did she tell you that?
- A. About five years ago.
- Q. That was the first time that she told you, was it? A. No, before that.
 - Q. Did she tell you very many things?
 - A. Yes.
 - Q. Did she ever talk with you about Kula?
 - A. Yes.
- Q. Had she herself been in Hawaii and been at Kula, Maui? A. No.
 - Q. Was Kan She ever in Hawaii? A. No.
- Q. Then how did she know that you were born in Hawaii? A. My uncle knew.
 - Q. Where is your uncle now? A. In Maui.
 - Q. That is Lee Wah Koon? A. Yes.
 - Q. Did you ever see him?
- A. No, except when I was very young and I cannot remember.
- Q. Then Lee Wah Koon has not made any trip to China very recently has he?
 - A. No, but he has been back to China.
- Q. If he had made a trip to China in recent years he would undoubtedly have gone to see his wife, your aunt, and would have seen you and you would have seen him, would you not? A. Yes. [23]
- Q. Have you been living with your aunt in China? A. Yes, same house.
- Q. Is there any other way you have of knowing that you were born in Hawaii except from the fact that your aunt told you so? A. No.

- Q. Did anyone else tell you that you were born in Hawaii except her? A. No.
 - Q. Did she speak of it very often? A. Yes.
 - Q. About how old is your aunt? A. About 40.
 - Q. Has she any children? A. No.
- Q. Did your uncle Lee Wah Koon ever have any other wife except your aunt Kan She? A. No.
 - Q. What is Lee Wah Koon's occupation?
 - A. Raising pigs.
- Q. When was this picture of you on this affidavit taken? A. Six or seven years ago.
 - Q. How old were you then?
 - A. Five or six years old.
 - Q. Where was it taken? A. I do not remember.
 - Q. Why didn't you get a more recent picture?
- A. Because that picture was sent to my uncle and that was all he had.
- Q. Don't you remember of having a picture taken somewhere?

 A. I cannot remember now.
- Q. Do you remember of ever having had a picture taken at any time? A. No, except this one.
- Q. But you remember having this picture taken do you? A. Yes.
 - Q. But don't you remember where it was taken?
 - A. No.
 - Q. Where have you been living in China?
 - A. At Lee Yuk Bin.
 - Q. Was this picture taken at that place?
 - A. I do not remember.
- Q. How long have you been living at Lee Yuk Bin? A. More than ten years.

- Q. Have you made any trips away to some other village or to a city since you have been living there?
 - A. No.
- Q. Then how could the picture have been taken at any other place?
- A. I do not remember where the picture was taken.
- Q. If you have been at Lee Yuk Bin for ten years and more and have never been to any other place and this picture was taken during the past ten years how can it be possible for it to have been taken anywhere else except at Lee Yuk Bin?
 - A. I think it was taken there.
 - Q. How large a place if Lee Yuk Bin?
 - A. A large village.
 - Q. Are there very many stores there?
 - A. About ten.
- Q. Are there any photograph galleries there where they take pictures of people? A. No.
- Q. Does any photographer ever come around and take pictures of people there? A. Yes.
 - Q. When did you decide to come to Hawaii?
 - A. A long time ago.
 - Q. Is your father living? A. No.
 - Q. What was his name? A. Lee Hin Kwai.
 - Q. What was his other name?
 - A. Lee Jung Ping.
 - Q. When did he die?
 - A. Five or six years ago.
 - Q. Where did he die? A. In Hawaii.
 - Q. Is your mother living? A. No.

- Q. What was her name? A. Lum She.
- Q. When did she die? A. About ten years ago.
- Q. Where did she die?
- A. I think she died in Hawaii.
- Q. How many brothers and sisters have you?
- A. One brother, no sisters.
- Q. What is the name of your brother?
- A. Lee Wah Ki.
- Q. Where is he?
- A. Here, came with me on the same boat.
- 4382/598 Cases of Lee Wah Ki and Lee Wah Leong, Alleged Hawaiian-born Chinese HK. 1, 2 & 4, ex SS. "Shinyo Maru," September 3, 1919. 9/11/19. [24]
- Q. Did you ever have any brothers or sisters that died? A. I do not remember.
 - Q. How old is Lee Wah Ki? A. Fourteen.
 - Q. By Chinese count?
 - A. American count; he is my younger brother.
 - Q. What is the date of his birth? A. KS. 31.
 - Q. What month and day?
 - A. 11th month, 17th day (December 13, 1905).
 - Q. Where was he born? A. Also on Maui.
 - Q. At the same place where you were born?
 - A. Yes.
- Q. When did you go to China? A. In KS. 33 (1907).
 - Q. Can you give the date? A. No.
 - Q. On what steamer did you go?
 - A. I do not remember.
 - Q. Who went with you?

- A. Lee Wah Chan, my father's cousin.
- Q. Didn't your father go? A. No.
- Q. Didn't your mother go? A. No.
- Q. Did your father go to China later on?
- A. No.
- Q. Did your mother? A. No.
- Q. Is Lee Wah Chan your father's cousin or your father's brother? A. Cousin.
 - Q. Is Lee Wah Koon your father's brother?
 - A. No.
- Q. Well you said Lee Wah Koon was your uncle then if he is not your father's brother how is he your uncle?

 A. Cousin of my father.
- Q. Is Lee Wah Koon a brother of Lee Wah Chan? A. Yes.
 - Q. They are both real brothers are they?
 - A. Yes.
- Q. That is Lee Wah Koon and Lee Wah Chan, they had the same father and the same mother did they? A. Yes.
 - Q. You are sure of that are you? A. Yes.
 - Q. He is the man that took you to China, is he?
 - A. Yes.
- Q. Well, did you brother go too at that time or some other time? A. Same time.
- Q. Has Lee Wah Chan been back to Hawaii since that time or has he been living in China right along all the time? A. Living until now in China.
 - Q. He never came back then? A. No.
 - Q. What is his occupation, Lee Wah Chan?
 - A. He plants rice a little.
 - Q. Is he at Lee Yuk Bin? A. Yes.

- Q. Is he married? A. Yes.
- Q. What is the name of his wife?
- A. I do not remember.
- Q. Is she in China? A. Yes.
- Q. How many children has Lee Wah Chan?
- A. None.
- Q. About how old is his wife?
- A. Between 40 and 50.
- Q. Has he any other wife? A. No.
- Q. Had Lee Wah Chan and his wife and Kan She the wife of Lee Wah Koon lived together in the same house? A. No.
- Q. How is it that you have not been living with Lee Wah Chan in his house?
 - A. Kan She, my aunt, asked me to live with her.
- Q. Does she live all alone except that you were with her? A. Yes.
 - Q. With whom has your brother been living?
 - A. In the same house with Kan She.
 - Q. Not with Lee Wah Chan? A. No.
- Q. About how far is it from Kan She's house to Lee Wah Chan's house?
 - A. Over ten houses away.
 - Q. Have you seen Lee Wah Chan very often?
 - A. Yes.
 - Q. Visited his house? A. Yes.
- 4382/598 Cases of Lee Wah Ki and Lee Wah Leong, Alleged Hawaiian-born Chinese HK. 1, 2 & 4 ex SS. "Shinyo Maru," September 3, 1919. 9/11/19. [25]
 - Q. Very many times? A. Every day.

- Q. How is it that Lee Wah Chan never told you that you were born in Hawaii at Kula Maui?
 - A. He told me.
- Q. You said that Kan She told you that you were born in Hawaii and I asked you if anyone else told you that you were born in Hawaii and you said nobody else only Kan She?
 - A. I did not think about Lee Wah Chan.
- Q. When Lee Wah Chan took you and your brother to China did he take his wife along with him at the same time? A. I do not remember.
 - Q. Was his wife in Hawaii?
 - A. I do not remember.
 - Q. Didn't they ever tell you? A. No.
 - Q. What have you been doing in China?
 - A. Going to school.
 - Q. How long have you been going to school?
 - A. Four or five years.
 - Q. When did you quit school?
 - A. Just before I came here.
 - Q. What has your brother been doing?
 - A. Also going to school.
 - Q. Same school with you? A. Yes.
 - Q. How many teachers are there in that school?
 - A. One.
 - Q. A man? A. Man.
 - Q. What is his name? A. Yin Bak Yee.
 - Q. How many teachers are there in that school?
 - A. One teacher and over twenty students.
 - Q. How many schools are there in Lee Yuk Bin?
 - A. Two or three.

- Q. How far is the school that you went to from your house? A. Over one hundred feet.
 - Q. A little over a hundred feet you mean?
 - A. Yes.
- Q. How many people are now living in the house with your aunt Kan She?
 - A. Two, including Kan She.
 - Q. Kan She and who else? A. My cousin.
 - Q. What is his name?
- A. Lee Kam Moy.
 - Q. How old is he? A. little over twenty.
 - Q. Who is his father? A. Lee Wah Koon.
- Q. You said that Lee Wah Koon did not have any children?
- A. I thought you asked whether he had any daughters.
 - Q. How many children has Lee Wah Koon?
 - A. No girls; only one son.
 - Q. Is Kan She his mother? A. Yes.
 - Q. Where was he born? A. I do not remember.
 - Q. But he was not born in Hawaii?
 - A. I do not know.
- Q. You said his mother, Kan She, was never in Hawaii a while ago, so if his mother was never in Hawaii he could not have been born in Hawaii?
 - A. No, he was not born in Hawaii.
- Q. Was he ever in Hawaii? A. No.
 - Q. Is Lee Kam Moy married? A. No.
 - Q. Are you married? A. No.
- Q. How many people are living in Lee Wah Chan's house? A. Only he and his wife.

- Q. Has he any children? A. No.
- Q. How many brothers and sisters did your father have? A. One brother.
- 4382/598 Cases of Lee Wah Ki and Lee Wah Leong, Alleged Hawaiian-born Chinese HK. 1, 2 & 4 ex SS. "Shinyo Maru," September 3, 1919. 9/11/19. [26]
 - Q. No sisters? A. No.
 - Q. What is the name of his brother?
 - A. Lee Hin Ming.
 - Q. Where is he? A. In Hawaii.
 - Q. Living? A. No; dead.
 - Q. When did he die? A. In CR. 4 (1915).
 - Q. Did he die in China or in Hawaii?
 - A. In Hawaii.
 - Q. Was he married? A. Yes.
 - Q. Where is his wife? A. I do not know.
 - Q. Is she living? A. I do not know.
 - Q. Did he have any children? A. No.
 - Q. Did not have any children?
 - A. I do not know.
 - Q. What was Lee Hin Ming's occupation?
 - A. I do not know.
- Q. Was he your father's own brother or was he a cousin? A. Real brother.
- Q. How is it that you know so much more about Lee Wah Koon than you do about Lee Hin Ming, who was a closer relative?
- A. Because I was living with Lee Wah Koon's wife in China.
 - Q. Are your father's parents living? A. No.

- Q. Did you ever see either one of them?
- A. No.
- Q. Do you know what their names were?
- A. I do not know.
- Q. Did your father have a house in China?
- A. No.
- Q. Was Lee Hin Ming older or younger than your father? A. He was younger.
- Q. Did you ever have any brothers or sisters that died? A. I do not know.
 - Q. Who are going to be witnesses for you?
 - A. Lee Dai Hoo and Lee Wah Koon, that is all.
 - Q. Did you ever see Lee Dai Hoo? A. Yes.
 - Q. Where? A. In China.
 - Q. When did you see him the last time?
 - A. About five years ago.
 - Q. At Lee Yuk Bin? A. Yes.
 - Q. About how old is Lee Dai Hoo?
 - A. About 20.
 - Q. Was he in China very long? A. Yes.
 - Q. Did he live at Lee Yuk Bin? A. Yes.
 - Q. How far did he live from you?
 - A. At the other end of the village.
- Q. About how many houses are there in Lee Yuk Bin? A. Four or five hundred houses.
 - Q. Is Lee Dai Hoo married?
 - A. I do not know.
 - Q. Did you ever visit his house? A. Yes.
 - Q. Are his parents living? A. Yes.
 - Q. What are their names? A. Lee Chu Dai.
 - Q. Is he in China? A. In Hawaii.

- Q. Who is the mother of Lee Dai Hoo?
- A. I do not know.
- Q. Is she in China? A. Yes.
- Q. How many brothers and sisters has Lee Dai Hoo? A. I do not know.
 - Q. Has he any brothers or sisters in China?
 - A. Two sisters.
 - Q. No brothers? A. No.
- Q. Then you know he has a couple of sisters in China but that is all you do know, do you?
 - A. Yes.
 - Q. Where was Lee Dai Hoo born?
 - A. In Hawaii.
- 4382/598 Cases of Lee Wah Ki and Lee Wah Leong, Alleged Hawaiian-born Chinese, HK. 1, 2 &4 ex SS. "Shinyo Maru," September 3, 1919. 9/11/19. [27]
 - Q. Did Lee Dai Hoo go to school in China?
 - A. I do not know.
 - Q. You know what he did?
 - A. He did nothing.
- Q. What is the nearest large place to Lee Yuk Bin? A. Lum Yuk Bin.
 - Q. That larger than Lee Yuk Bin?
 - A. No, Lee Yuk Bin is larger.
 - Q. What large city is near there?
 - A. Seacke City, H. S. D.
 - Q. Have you any further statement to make?
 - A. No.

(Sgd. in Chinese Characters)

LEE WAH LEONG.

4382/598 Cases of Lee Wah Ki and Lee Wah Leong, Alleged Hawaiian-born Chinese, HK. 1, 2 & 4 ex SS. "Shinyo Maru," September 3, 1919. 9/11/19. [28]

LEE WAH KI sworn, testifies:

(By Inspector FARMER,)

Q. What is your name and age?

A. Lee Ki; 14 years old.

Q. What was the date of your birth?

A. 11th month, 17th day, KS. 31. (December 13, 1905.)

Q. Where were you born? A. Kula, Maui.

Q. Kula is a large district do you know where in Kula it was? A. I do not know.

Q. When did you go to China?

A. KS. 33 (1917).

Q. What month?

A. 7th or 8th month but I do not remember whether it is American or Chinese count.

Q. On what steamer did you go?

A. I do not remember.

Q. Where have you been living in China?

A. Lee Yuk Bin.

Q. How large a place is that?

A. About 1,000 houses.

Q. With whom have you been living?

A. With Lee Wah Koon's wife, she is my aunt.

Q. What is the name of his wife?

A. Kan She. She is from Nam Mee Tong village.

- Q. About how old is she? A. I do not know.
- Q. Is Lee Wah Koon your uncle?
- A. No; just my father's cousin.
- Q. How do you know that you were born on Maui? A. My aunt told me often.
 - Q. That is Kan She? A. Yes.
- Q. Did anyone else ever tell you that you were born in Hawaii? A. No.
 - Q. You are sure of that, are you?
 - A. I am sure.
 - Q. Was Kan She ever in Hawaii? A. No.
- Q. Then how does she know that you were born in Hawaii?
 - A. I do not know how she knows.
 - Q. She is in China now, is she? A. Yes.
 - Q. Where is Lee Wah Kan?
 - A. At Kula, Maui.
 - Q. When did you see him last?
 - A. A long time.
 - Q. Where did you see him?
 - A. I do not remember him.
 - Q. How many children has Lee Wah Kan?
 - A. One son, about 20 years old.
 - Q. What is his name?
 - A. Lee Kam Moy, he is not married.
 - Q. Where is he? A. In China.
 - Q. Where was he born? A. Born in China.
 - Q. Was he ever in Hawaii? A. No.
- Q. About how many stores are there in Lee Yuk Bin? A. Over twenty.
 - Q. Are there any photograph galleries there?

- A. No.
- Q. Does any man ever come around sometimes and take pictures of the people?
 - A. I did not see any.
- Q. Where was your picture taken that is on this affidavit? A. At Nam Long Hee.
 - Q. When was it taken?
 - A. Four or five years ago.
- Q. How far is it from Lee Yuk Bin to Nam Long Hee? A. Nearly one tong (3 miles).
- Q. You went over there and had this picture taken did you? A. Yes.
- Q. Is this a picture of your brother (showing picture on affidavit)?
 - A. Yes, my own brother.
 - Q. Where was that picture taken?
 - A. Also at Nam Long Hee.
 - Q. At the same time that you had this picture?
 - A. He took that a little before.
- Q. They have a photograph gallery at Nam Long Hee, have they? A. Yes.
 - Q. Are your parents living?
 - A. No, both are dead.
 - Q. What was the name of your father?
 - A. Lee Yin Kwai, alias Lee Chun Tung.
 - Q. When did he die?
 - A. About five or six years ago.
 - Q. Where did he die? A. At Maui.
 - Q. What was the name of your mother?
 - A. Lum She.

- 4382/598 Cases of Lee Wah Ki and Lee Wah Leong, Alleged Hawaiian-born Chinese, HK.
 - 1, 2 & 4 ex SS. "Shinyo Maru." 9/3/19. 9/11/19. [29]
 - Q. When did she die?
 - A. About ten years ago.
 - Q. Where did she die? A. Maui.
 - Q. How many brothers and sisters have you?
 - A. One brother.
 - Q. What is his name? A. Lee Wah Leong.
 - Q. He is the boy that came with you, is he?
 - A. Yes.
 - Q. How old is he? A. Fifteen.
 - Q. What was the date of his birth?
- A. 6th month, 7th day KS. 30 (December 22, 1914).
 - Q. Where was he born? A. Kula, Maui.
- Q. Did you ever have any brothers or sisters that died? A. No.
- Q. Did your father and mother go with you to China?
- A. No; went with my brother and my father's cousin.
- Q. What is the name of your father's cousin who took you to China? A. Lee Wah Chan.
 - Q. Where is he now? A. In China.
 - Q. At Lee Yuk Bin? A. Yes.
 - Q. Has he ever been back to Hawaii?
 - A. No.
 - Q. Has he ever been back to Hawaii?
 - A. No.

- Q. He has been living in Lee Yuk Bin ever since he went to China, has he? A. Yes.
 - Q. He is your father's cousin, is he?
 - A. Not cousin, just a distant relative.
- Q. Is Lee Wah Koon any relation to Lee Wah Chan? A. They are brothers.
 - Q. Own brothers or cousins?
 - A. Own brothers.
 - Q. Is Lee Wah Chan married? A. Yes.
 - Q. What is the name of his wife?
 - A. I do not know.
 - Q. Where is she?
 - A. At Lee Yuk Bin, China.
 - Q. How many children has Lee Wah Chan?
 - A. Three sons and two daughters.
 - Q. What are their names?
- A. Lee Wah Chew, 16 or 17; Lee Wah Jan, I do you know the age; Lee Wah Quon, about 5 or 6; girls Lee Yin, I do not know how old; Lee Hong, I do not know how old.
 - Q. Where are they?
 - A. At Lee Yuk Bin, China.
 - Q. Living with their parents?
 - A. Living with their father.
- Q. Lee Wah Chan and his wife are both in China, are they, and all of the children?
 - A. Yes.
 - Q. What is Lee Wah Chan's occupation?
 - A. Planting rice.
- Q. Lee Wah Chan being the man who took you to China, why is it that you have not been living

with him in his house instead of living with Kan She, the wife of Lee Wah Koon?

- A. Kan She asked me to live with her.
- Q. Have you and your brother both been living with Kan She?
 - A. Yes, and also Lee Kam Moy.
 - Q. Is Lee Kam Moy her son? A. Yes.
- Q. Where were these children of Lee Wah Chan born? A. In China.
 - Q. Was Lee Wah Chan's wife ever in Hawaii?
 - A. No.
- Q. Did Lee Wah Chan ever have any other wife, or just that one wife?
 - A. Married twice, the other wife is dead.
- Q. Are these children all by this wife or was the other wife the mother of these children?
- A. The two daughters belong to the former wife but the sons belong to the present wife.
 - Q. Are those daughters older than the sons?
 - A. Yes.
- Q. Then when Lee Wah Chan went to China and took you and your brother he did not take along any wife or children of his own did he?
 - A. No.
 - Q. What have you been doing in China?
 - A. Going to school.
 - Q. How long have you been going to school?
 - A. Five years.
 - Q. When did you quit? A. Quit this year.
 - Q. Was your brother also going to school?
 - A. Yes.

- 4382/598 Cases of Lee Wah Ki and Lee Wah Leong, Alleged Hawaiian-born Chinese, HK.
 - 1, 2 & 4 ex SS. "Shinyo Maru." 9/3/19. 9/11/19. [30]
 - Q. Did he go to the same school as you did?
 - A. No.
 - Q. He went to a different school, did he?
 - A. Different school.
 - Q. How many schools are there in Lee Yuk Bin?
 - A. Three or four.
 - Q. How many children were in your school?
 - A. 34 or 35.
 - Q. How many teachers were there? A. One.
 - Q. What was his name? A. Gon Chow Hon.
 - Q. How far is the school from your house?
 - A. Pretty far.
- Q. How far from your house is the school where your brother went? A. Pretty far.
 - Q. Farther than yours or closer?
 - A. My school is farther.
 - Q. Do you know the name of his teacher?
 - A. Yin Bak Yee.
- Q. Do you know how many children were in that school? A. Over 40.
 - Q. Was it just one teacher in his school?
 - A. One teacher.
 - Q. Are your father's parents living? A. No.
 - Q. When did they die?
 - A. I do not remember.
 - Q. You know what their names were?
 - A. Father—Lee Gar Bong, mother Lum She.

- Q. They died a long ago did then?
- A. Yes, many years ago.
- Q. Both of them? A. Yes.
- Q. So you never saw them?
- A. I do not know them.
- Q. How many brothers and sisters did your father have? A. One brother, no sisters.
 - Q. What is his name? A. Lee Hin Ming.
 - Q. Is he living now? A. No.
 - Q. When did he die?
 - A. More than ten years ago.
 - Q. Where did he die? A. At Maui.
 - Q. Was he married? A. I do not know.
- Q. How far was it from your house that is where you were living with Kan She to Lee Chan's house? Not very far.
 - Q. Did you often visit Lee Wah Chan's house?
 - A. Yes.
- Q. And did he often come to the house where you were living? A. Yes.
- Q. How many people are living with Lee Kan She in her house now?
 - A. Only herself and the son.
- Q. How many people are living in Lee Wah Chan's house?
- A. Four, two sons, himself and his wife. One of his sons went to a foreign country.
 - Q. I suppose that was the oldest one was it?
 - A. Yes.
 - Q. Lee Wah Chew? A. Yes.
 - Q. And I suppose the two girls are married and

gone to some other village? A. Yes.

- Q. Lee Wah Chan took you to China and he lived close to you ever since and you have been well acquainted with him and his family, you have often visited his house, he has often visited your house and yet he never told you that you were born in Hawaii, you would naturally think that he would have mentioned the fact some time or other during all the time that you have been in China, what have you to say about that? A. He told me.
- Q. He told you that you were born in Hawaii, did he? A. Yes.
- Q. You said that Kan She told you that you were born in Hawaii but that nobody else told you that and you said you were sure of that?

 A. I forgot.
- Q. Do you know what your father did when he was in Hawaii? A. Raising pigs.
 - Q. You know what Lee Wah Koon is doing now?
 - A. Also raising pigs.
 - Q. How long did you go to school?
 - A. Five years.
- Q. Did you go to the same school all the time or did you go to different schools?
 - A. Same school.
 - Q. Have you any further statement to make?
 - A. No. that is all.
- 4382/598 Cases of Lee Wah Ki and Lee Wah Leong, Alleged Hawaiian-born Chinese, HK.
 - 1, 2 & 4 ex SS. "Shinyo Maru." 9/3/19. 9/11/19.

(Sgd. in Chinese Characters)

LEE WAH KI. [31]

Applicant LEE WAH LEONG recalled, testifies:

- Q. Did your father's cousin, Lee Wah Chan, ever have any other wife except the wife that he now has in China, that one woman? A. No.
- Q. And you said, did you, that Lee Wah Chan did not have any children? A. Yes.
 - Q. Has he any children, Lee Wah Chan?
 - A. No children.
- Q. Your alleged brother testified just now and said that he has several children?
 - A. No, he has no children.
- Q. I want to ask you if when you were in China and you went to school there whether you went to the same school all the time or did you go to different schools?

 A. Same school.
- Q. And was that the same school that your alleged brother attended? A. Same school.
- Q. Did he ever attend any other school or did he go to the same school all the time that he went to school? A. Same school.
- Q. Your alleged brother says that he went to a different school?
 - A. Same school, maybe he forgot about it.
 - Q. Have you any further statement to make?
- 4382/598 Cases of Lee Wah Ki and Lee Wah Leong, Alleged Hawaiian-born Chinese, HK. 1, 2 & 4 ex SS. "Shinyo Maru." 9/3/19. 9/11/19. [32]

LEE WAH KI recalled, testifies:

Q. Who are going to be witnesses for you?

- A. Lee Dai Hoo and Lee Wah Koon.
- Q. Anyone else? A. No.
- Q. When did you see Lee Dai Hoo last?
- A. Five or six years ago.
- Q. Where did you see him? A. In China.
- Q. You know where he was born?
- A. I do not know.
- Q. About how old is he? A. 21 or 22.
- Q. Is he married? A. Yes.
- Q. What is the name of his wife?
- A. I do not know.
- Q. Is she in China? A. In China.
- Q. Has Lee Dai Hoo any children?
- A. No children.
- Q. Did you know him for a very long time?
- A. Yes.
- Q. Did he live in Lee Yuk Bin village?
- A. Yes.
- Q. Do you know his father? A. No.
- Q. You know his mother? A. Yes.
- Q. Is she there now? A. In China.
- Q. Do you know what her name is?
- A. I do not know.
- Q. Has Lee Dai Hoo any brothers or sisters in China?
- A. I saw one of his sisters but I do not know how many he has.
 - Q. Did you see any brothers? A. No.
 - Q. How far did he live from where you lived?
 - A. Pretty far away.
 - Q. Did you see him very often?

- A. He came back to Hawaii.
- Q. Before he came back to Hawaii did you see him very often? A. Yes.
 - Q. Did he go to school? A. I do not know.
- Q. Your alleged brother Lee Wah Leong says that you and he both went to the same school in China and not to different schools?
 - A. Just last year.
 - Q. What was just last year?
 - A. Same school last year.
- Q. He went to the same school that you did last year, did he? A. Yes.
 - Q. Did you go to the same school all the time?
 - A. Same school.
- Q. Then did he change from one school to another and leave the school from where he was going and go to the school where you were attending?
 - A. I do not know.
- Q. Did he go to two different schools at different times?
 - A. He went to the same school last year with me.
 - Q. Did he go to another school year before last?
 - A. Yes.
- Q. He says himself that he went to the same school all the time?
 - A. Maybe he forgot last year.
 - Q. Did you ever change schools?
 - A. No, only one school.
- Q. Lee Wah Leong also says that Lee Wah Chan your father's cousin, the man that you say took you to China, never had but one wife and that he

has no children whatever but you have testified that he has several children?

- A. He does not remember.
- Q. He does not remember what?
- A. He does not remember that he had any wife.
- Q. How could he help but remember about the children if he has been living in the same village?
 - A. Maybe he forgot.
- Q. Did somebody tell him what to say when he came here? A. No, never told me anything.
 - Q. Did somebody tell you what to say?
 - A. No, but I am telling the truth.
- Q. Is he really your brother or is he somebody else? A. My own brother.
 - Q. Maybe he is adopted?
 - A. No, my mother's own son.
- 4382/598 Cases of Lee Wah Ki and Lee Wah Leong, Alleged Hawaiian-born Chinese, HK. 1, 2 & 4 ex SS. "Shinyo Maru." 9/3/19. 9/11/19. [33]
- Q. If he is your brother and has been living right there all the time and knows all these people why is it that he cannot tell about that?
 - A. He is a boy that does not talk much.
 - Q. Have you anything more to say? A. No. Board adjourned 11:30 A. M.
- 4382/598 Cases of Lee Wah Ki and Lee Wah Leong, Alleged Hawaiian-born Chinese, HK. 1, 2 & 4 ex SS. "Shinyo Maru." 9/3/19. 9/11/19. [34]

1:15—Board reconvened 9/11/19.

Witness LEE WAH KOON, sworn, testifies: (By Inspector FARMER) CR. 4694, verified February 28, 1903.

- Q. What is your name and age?
- A. Lee Wah Koon, alias Lee Wing Kee; 50 years old.
 - Q. Where were you born?
 - A. Lee Yuk Bin, China.
 - Q. When did you first come to Hawaii?
 - A. KS. 16 (1890).
- Q. How many times have you been back to China? A. Twice.
 - Q. First time?
 - A. In KS. 21 (1895) came back in KS. 22 (1896)
 - Q. Second time?
 - A. KS. 29, (1903) came back KS. 30 (1904).
 - Q. Are you married?
 - A. Yes, my wife, Kan She.
 - Q. How old is she?
 - A. I am 9 years older than her.
 - Q. Where is she? A. In China.
 - Q. How many children have you?
 - A. No daughters, one son.
 - Q. What is his name? A. Lee Kam Moy.
 - Q. Where is he? A. In China.
 - Q. Where was he born? A. Born in China.
 - Q. Is he your own son or an adopted son?
 - A. My own son.
 - Q. How old is he? A. Twenty-one.
 - Q. Was your wife ever in Hawaii? A. No.

- Q. Did you ever have any other wife except Kan She? A. No.
- Q. How would it be possible for you to have a son who is now twenty-one years of age born in China if you came to Hawaii in KS. 16 and have only made two trips back to China, once in KS. 21 and returned to Hawaii the next year and again in KS. 29 and returned the next year because if your son is twenty-one years old now he was born in 1898 or 1899 if you are giving his age by Chinese count and you were in Hawaii all the time from 1896 to 1903? A. 23 years old.
 - Q. Then he is 23 years old is he? A. Yes.
 - Q. Is he married? A. No.
 - Q. Did he ever have any children that died?
 - A. No.
 - Q. What is your occupation?
 - A. Raising pigs at Kula.
 - Q. Where? A. Kula.
 - Q. At what place in Kula?
 - A. Naalaaea, Waikoa, Kula, Maui.
- Q. How long have you been in the business of raising pigs? A. Nearly twenty years.
 - Q. What is the purpose of your visit here to-day?
- A. Come as a witness for Lee Wah Leong and Lee Wah Ki.
 - Q. How old is Lee Wah Leong? A. Fifteen.
 - Q. What was the date of his birth?
 - A. 6th month, 10th day KS. 30 (July 22, 1904).
 - Q. Where was he born? A. At Naalaea.
 - Q. How old is Lee Wah Ki? A. 14.

- Q. What was the date of his birth?
- A. 11th month, 17th day, KS. 31 (December 13, 1905).
 - Q. Where was he born? A. At Naalaea.
 - Q. When did these two boys go to China?
- A. When Wah Leong was four years old and Wah Ki was three.
 - Q. In what year was that? A. KS. 33 (1907)
 - Q. What month?
 - A. About the 7th or 8th month.
 - Q. On what steamer did they go?
 - A. I do not remember the boat.
- Q. Do you remember the name of the steamer on which they went?
 - A. I do not remember. I was on Maui.
- 4382/598 Cases of Lee Wah Ki and Lee Wah Leong, Alleged Hawaiian-born Chinese, HK.
 - 1, 2 & 4 ex SS. "Shinyo Maru." 9/3/19.
 - 9/11/19. [35]
- Q. Didn't you come over to Honolulu to see them off? A. I did not.
- Q. How is it that you know the exact date of these boys' births—are you able to remember?
- A. Because I went to see them when they were born and my place was near them.
 - Q. Are you any relation to them?
 - A. Just a cousin.
- Q. Can you remember the exact date that is the year and month and the day of every child that is born near where you live an dremember it for fifteen years? A. No.

- Q. Then how does it happen that you remember it in this case?
 - A. Because these two boys are related to me.
 - Q. But you say they are distant relatives?
 - A. Three generations before.
- Q. Is it not a fact that you have been instructed and told what the date of the births of these boys were so that you could testify to it and that you are really testifying from your own knowledge but from what you have been told?
 - A. I can remember.
- Q. What was the date of the birth of your son in China?
 - A. Third month, 29th day KS. 22 (May 11, 1896).
 - Q. Were you in China at the time he was born?
 - A. Yes.
- Q. How long after he was born was it that you came back to Hawaii? A. Few months.
- Q. When I asked you the age of your own son you said he was 21 years old and afterwards you found out that could not be or else your trips back to China as you stated were not correct and so you changed it; you couldn't even tell the age of your own son and yet you are now giving the exact date not only of his birth but the births of these two applicants and yet you couldn't even tell how many years old he was at first, both of these two boys when they testified this morning said that your son was 21 years old and now you come and you say that he is 21 years old that agreed with their state-

ments and then you changed it and gave his age as 23?

- A. I cannot remember at once. Maybe they forgot too they are young boys.
- Q. But you did remember at once without any hesitation the exact year, month and day of the birth of these two boys? A. No answer.
- Q. Were you in Hawaii at the time these boys were born?
- A. Lee Wah Leong was born two or three months before I came back from China.
- Q. Did you not say that you attended the month old feast of Lee Wah Ki?
- A. Yes. He was born long time after I came back.
- Q. The record shows that you said that you went to see the boys right after they were born because they were born near your place and so you remembered the dates of their births?
- A. The older boy born two months before I came back but the younger I attended the month old feast.
- Q. So Lee Wah Leong was born when you were in China and before you got back to Hawaii from China, was he? A. Yes.
- Q. He was two or three months old when you arrived and went over to Maui and saw him, was he? A. Yes.

NOTE: The records of this office show that this witness was granted return permit #20-444 and went to China February 28, 1903, per SS. "Doric." He returned per SS. "Gaelic"

September 16, 1904, and was admitted as a returning laborer. He qualified on property.

- Q. Are these two boys brothers? A. Yes.
- Q. Did they have the same father and the same mother? A. Yes.

4382/598 Cases of Lee Wah Ki and Lee Wah Leong, Alleged Hawaiian-born Chinese, HK.

- 1, 2 & 4 ex SS. "Shinyo Maru." 9/3/19. 9/11/19. [36]
- Q. Are their parents living now? A. No.
- Q. Who was their father?
- A. Lee Hin Kwai alias Lee Jung Ping.
- Q. When did he die?
- A. Six or seven years ago.
- Q. Where? A. In Honolulu.
- Q. What was his occupation?
- A. Raising pigs.
- Q. Was that his occupation all the time that he was in Hawaii? A. Yes.
 - Q. Where did he raise pigs over on Maui?
 - A. At Naalaea, Maui.
 - Q. Was he in partnership with you?
 - A. No, his own.
- Q. What was the name of the mother of these two boys? A. Lum She.
 - Q. When did she die?
 - A. A little over ten years ago.
 - Q. Where? A. In Honolulu.
- Q. How many children did Lee Hing Kwai and Lum She have? A. These two boys.
 - Q. Did they have any children that died?
 - A. No.

- Q. How old were these boys when they went to China?
 - A. One was four and the other three.
 - Q. Is that by Chinese count? A. Yes.
 - Q. Who took them to China?
 - A. Lee Wah Chan.
- Q. Did anyone else go along with him to help him take care of the boys?
 - A. I do not know I was on Maui.
- Q. Wasn't there any woman to look after them on the boat when they went to China?
 - A. I do not know.
 - Q. Was Lee Wah Chan married? A. Yes.
 - Q. Was his wife in Hawaii? A. No, China.
 - Q. Never in Hawaii? A. No.
 - Q. Is Lee Wah Chan any relation to you?
 - A. He is my brother.
- Q. He has the same father and the same mother that you do? A. Yes.
 - Q. Has Lee Wah Chan any children?
 - A. Yes, but I do not know their names.
 - Q. Did you ever see any of them?
 - A. No, I came here.
- Q. They were all born after you left China, were they, that is after you left the last time?
 - A. Yes.
 - Q. Did he have more than one wife?
 - A. He married twice, his former wife is dead.
 - Q. Did he have children by both wives?
 - A. The girls belong to the former wife.
 - Q. Did you ever see the girls or either of them?

- A. Yes.
- Q. When I went back to China.
- Q. Did you see any boy at that time? A. No.
- Q. Are the parents of Lee Hin Kwai living?
- A. No.
- Q. Did you ever know them?
- A. No, I did not know them.
- Q. How many brothers and sisters did Lee Hin Kwai have? A. No sisters; only one brother.
 - Q. Is he living now that brother? A. No.
 - Q. What was his name? A. Lee Hin Ming.
 - Q. When did he die?
 - A. Four or five years ago.
 - Q. Where did he die? A. In Honolulu.
 - Q. Was he married? A. No.
 - Q. Never was married? A. No.
- Q. How do you know that these two boys who have come here are the same boys that were born on Maui? A. No answer.
 - Q. Do you know that they are the same boys?
 - A. Yes.
 - Q. How do you know?
 - A. I sent for them to come.
 - Q. You have not seen them yet have you?
 - A. No.
- 4382/598 Cases of Lee Wah Ki and Lee Wah Leong, Alleged Hawaiian-born Chinese, HK.
 - 1, 2 & 4 SS. "Shinyo Maru." 9/3/19. 9/11/19. [37]
 - Q. If you should see them would you know them?

- A. I don't think so; they went to China when they were very young.
- Q. Did Lee Hin Kwai go to China after the two boys went? A. No.
 - Q. Did his wife? A. No.
- Q. What did he want to send those two boys to China for when he himself and his wife were both in Hawaii? A. Because their mother died.
- Q. Did their mother die before they went to China?
- A. Yes, and the father could not take care of them.
- Q. Then their mother must have died twelve years ago? A. Yes.
 - Q. You said she died a little over ten years ago?
 - A. No answer.
- Q. You consider twelve a little more than ten, do you?
- A. So many years ago I cannot remember; the two boys went to China three or four months after their mother died.
- Q. Are you sure that it was in KS. 33 that they went to China? A. Yes.
 - Q. Might it not have been in KS. 34? A. No.
 - Q. Or 32 maybe?
 - A. KS. 33 but I am not very sure.
- Q. Did Lee Wah Chan secure a return permit to come back to Hawaii when he left? A. No.
- Q. He went with the intention of staying in China did he? A. Yes.

- Q. You have been to China then since 1904 that is KS. 30? A. No.
 - Q. Have you any further statement to make? A. No.
- 4382/598 Cases of Lee Wah Ki and Lee Wah Leong, Alleged Hawaiian-born Chinese, HK. 1, 2 & 4 ex SS. "Shinyo Maru." 9/3/19. 9/11/19. [38]

Witness LEE DAI HOO sworn, testifies: (By Inspector FARMER) In English.

Witness presents an honorable discharge from the United States Army dated July 11, 1919. Record on file, see file number 377–C.

- Q. What is your name? A. Lee Dai Hoo.
- Q. Have you any other name? A. No.
- Q. Are you married? A. No.
- Q. How old are you? A. 22.
- Q. Where were you born?
- A. Waikoa, Kula, Maui.
- Q. Have you ever been in China? A. Yes.
- Q. How many times? A. One time.
- Q. When? A. When I was eight years old.
- Q. When did you return to Hawaii?
- A. 1912; at that time I was 16 years old.

NOTE: This witness had his Hawaiian birth investigated in March, 1905, prior to his departure for China. He returned from China per SS. "Shinyo Maru" May 19, 1913, and was admitted as Hawaiian-born. See file number 377–C.

- Q. Is that the only time, just once you have been in China? A. Yes.
 - Q. Did you ever go to San Francisco?
 - A. No, sir.
 - Q. Is your father living? A. Yes.
 - Q. Where is he? A. Kula, Maui.
 - Q. Is your mother living? A. In China.
 - Q. What is her name?
 - A. I don't know her name.
 - Q. What is the family name? A. Leong She.
 - Q. What is your father's name?
 - A. Lee Chew Tai.
 - Q. How many brothers have you got?
 - A. One brother, Lee Tai Chong.
 - Q. Where is Lee Tai Chong?
 - A. At Kula, Maui.
 - Q. Did he go to China?
 - A. Yes, same time with me.
 - Q. When did he come back?
 - A. Three or four years ago.

NOTE: Lee Tai Chong returned from and was admitted as Hawaiian-born November 25, 1914. See file number 377–C.

- Q. How many sisters have you? A. Two.
- Q. Where are they? A. In China.
- Q. You come to testify for somebody to-day do you? A. Yes.
 - Q. Who?
 - A. Lee Wah Leong and Lee Wah Ki.
 - Q. About how old is Lee Wah Leong?
 - A. 15 years old.

- Q. How old is Lee Wah Ki? A. 14 years old.
- Q. They are brothers are they? A. Yes.
- Q. You ever see their father?
- A. Their father died long ago.
- Q. Did you ever see him? A. No.
- Q. Did you ever see the mother? A. No.
- Q. You know who their father was?
- A. Someone said his father was Lee Hin Kwai.
- Q. Do you know who their mother was?
- A. I don't know.
- 4382/598 Cases of Lee Wah Ki and Lee Wah Leong, Alleged Hawaiian-born Chinese, HK. 1, 2 & 4 ex SS. "Shinyo Maru." 9/3/19. 9/11/19. [39]
 - Q. Where did you see these two boys?
 - A. In China.
 - Q. Where, what village?
 - A. Canton, Lee Yuk Bin.
 - Q. Is that a big place?
 - A. Not a very big place, that is my country.
 - Q. As big as Wailuku? A. A little smaller.
 - Q. They got as many houses as Wailuku?
 - A. More than a thousand houses.
 - Q. Did you live near where these two boys lived?
 - A. Yes, not very far.
- Q. You saw these boys every day when you were in China? A. Not every day.
 - Q. But you saw them often did you? A. Yes.
 - Q. Who did they live with? A. Their aunt.
 - Q. You know what her name was?

- A. Kan She.
- Q. Who is her husband? A. Lee Wah Koon.
- Q. Where is he?
- A. He is that boy's uncle he was living in Maui.
- Q. Is he the man who came in here just now and testified? A. Yes.
 - Q. They have any children? A. One boy.
 - Q. What is his name? A. Le Cam Moy.
 - Q. What were these two boys doing?
 - A. Going to school.
 - Q. Did you go to school too?
- A. Yes. I was over eight years old and went to school too, when I came back they started to go to school.
- Q. They started to go to school when you left China to come here? A. Yes.
 - Q. Did you go to school in the same school house?
- A. No, sir; my country has lots of schools, more than four or five and I did not go to school with them, I went to one near to my place.
 - Q. How many schools in Lee Yuk Bin?
- A. I only know two or three, some hears more it all depends on the number of children.
- Q. These two boys both went to the same school or different school?
 - A. They went to the same school.
 - Q. Did you go to their house?
 - A. Yes, I went there often.
 - Q. Who did you see living in their house?
- A. Their aunt, the two boys and the cousin Lee Kam Moy.

- Q. Anybody else in that house? A. No.
- Q. Do you know when these boys went to China?
- A. I heard someone say but I did not see them go; I was only one or two years old.
- Q. Did you go to China before they did or after they did or did they go there first?
 - A. No answer.
- Q. You must have been eight years old when you went to China? A. Yes.
 - Q. How old were you when they went to China?
 - A. I don't know when they went to China.
 - Q. They were there first?
 - A. I think I was there first.
 - Q. Do you know who took them to China?
 - A. Somebody said his uncle Lee Wah/Chan.
 - Q. Uncle or cousin?
 - A. Uncle, he is Lee Wah Koon's brother.
- Q. Is Lee Wah Chan—is he a brother of their father? A. Yes, but not real brother.
- Q. The father was Lee Hin Kwai and this Lee Wah Chan, did they have the same father Lee Hin Kwai and Lee Wah Chan? A. No.
- Q. Then it was more of a cousin than brother was it not? A. Yes.
- Q. Lee Wah Chan is living there in Lee Yuk Bin? A. Yes.
 - Q. Is he married?
 - A. His wife died and he has another wife.
 - Q. You know the name of the present wife?
 - A. No.
 - Q. Has he got any children there?

- A. He has two girls.
- Q. Are they at Lee Yuk Bin?
- A. They are married and gone away.
- Q. Has he any boys?
- A. The boys when I left China they did not have any boys, I think they had one boy.
- 4382/598 Cases of Lee Wah Ki and Lee Wah Leong, Alleged Hawaiian-born Chinese HK. 1, 2 & 4 ex SS. "Shinyo Maru," 9/3/19. 9/11/19. [40]
 - Q. Was he there at that time? A. Yes.
 - Q. You know what his name was?
 - A. Lee Wah Chew, I think.
- Q. How do you know these boys were born in Hawaii? A. His aunt told me about them.
 - Q. All you know is just what you were told?
 - A. Yes.
 - Q. Did Lee Wah Chan ever tell you?
 - A. He told me too.
 - Q. He told you they were born in Hawaii?
 - A. Yes.
- Q. Are there a good many stores in Lee Yuk Bin? A. More than twenty, but I am not sure.
- Q. Does Lee Wah Chan and his wife live in the same house with Kan She? A. No, sir.
 - Q. Far away? A. Not very far.
- Q. If you saw these two boys now could you identify them?
- A. It has been eight years but I think I could recognize them.

(Identification is mutual.)

- Q. Have you anything more to say? A. No.
- Q. Lee Wah Chan have any other name?
- A. Lee Wing Nam.
- Q. Have you any more witnesses that you know of to testify in this case? A. No.

TAI HU LEE.

4382/598 Cases of Lee Wah Ki and Lee Wah Leong, Alleged Hawaiian-born Chinese HK. 1, 2 & 4 ex SS. "Shinyo Maru." 9/3/19. 9/11/19. [41]

STATEMENT BY INSPECTOR FARMER.

I have looked over all the passenger lists of steamers departing for the Orient during the months of May, June, July, August, September and to the 23d of October, 1907, but have been unable to find the name of either applicant or of Lee Wah Chan under either of his names on any of said passenger lists.

RICHARD L. HALSEY.—These applicants have not, in my opinion, satisfactorily shown that they were born in the Hawaiian Islands, and I therefore, move that they be given the usual notice that ten days will be allowed in which to produce additional evidence.

EDWIN FARMER.—I second the motion.

HARRY B. BROWN.—I concur.

NOTE: The applicants and the two witnesses are notified that they will be given ten days in which to produce additional evidence.

Board adjourned 3:00 P. M.

BOARD OF SPECIAL INQUIRY.

4382/598 Cases of Lee Wah Ki and Lee Wah Leong, Alleged Hawaiian-born Chinese HK. 1, 2 & 4 ex SS. "Shinyo Maru." 9/3/19. 9/11/19. [42]

#4382/598.

LEE WAH KI and LEE WAH LEONG—HB.—ex SS. "Shinyo Maru," 9/3/19.

9/24/19.

NOTE: The ten days having expired in which the applicants were to produce further evidence, two more witnesses are presented by the alleged uncle of the applicants, who states that he has no more witnesses to produce.

Witness, sworn, testifies: CR. #17063, not verified.

- Q. What is your name and age?
- A. Lee Sam Che, alias Lee Ka Fai; 60 or 61 years old.
 - Q. Where were you born?
 - A. At Lee Yuk Bin, China.
 - Q. How long have you been in Hawaii?
 - A. Since KS. 6 (1880).
- Q. How many times have you been back to China?
- A. Once, in KS. 24 (1898) and returned to Hawaii the following year.
 - Q. Are you married?
- A. Yes, my wife, Leong She, 40 years old, is in China.
 - Q. How many children have you?

- A. One son, Lee Uip Pun, born in KS. 25 (1899) in China, and now in a place near Java. I have no daughters.
 - Q. What is your occupation?
- A. Carpenter. I work for the Lee Lup Company, Honolulu.
 - Q. What is the purpose of your visit here to-day?
- A. I come as a witness for Lee Wah Leong and Lee Wah Ki.
 - Q. About how old is Lee Wah Leong?
 - A. About 14 or 15.
 - Q. Do you know the date of his birth?
 - A. About the 6th or 7th month of KS. 30 (1904).
 - Q. Where was he born?
 - A. At Naalaea, Kula, Maui, Hawaii.
 - Q. How do you know that he was born there?
- A. I was working at Kahului at the time and Kahului is on Maui.
 - Q. Is Kahului near Naalaea?
- A. No, it is far away, but Kahului is on Maui, the same island with Naalaea.
 - Q. How far is it from Kahului to Naalaea?
 - A. About 13 or 14 miles at that time by the road.
 - Q. How old is Lee Wah Ki?
- A. There is just one year's difference in their ages, Lee Wah Leong is the older.
 - Q. Do you know the date of Lee Wah Ki's birth?
- A. About the 9th, 10th or 11th month of the year KS. 31 (1905).
 - Q. Where was he born?
 - A. At the same place as Lee Wah Leong.

Q. When did you first see these two boys?

A. About KS. 32 (1906) I went up to build a house for my brother and passed by their father's house and dropped in and saw them. The older one was just able to walk and the other was in the cradle.

Q. Are you any relation to them?

A. No, only a distant relative.

Q. What relation are these two boys to each other? A. They are brothers.

Q. Did you see them very often before they went to China?

A. When I finished the job I passed by their father's house again and said good-bye to them and came back to Honolulu.

Q. Did you see them any more?

A. The next year their father came to Honolulu and I was working at Waipahu then. When I came to Honolulu I met their father and he told me his wife was sick and so they moved to Honolulu from that place.

#4382/598 Lee Wah Leong & Lee Wah Ki—HB.—ex SS. "Shinyo Maru," 9/3/19. 9/24/19. [43]

#4382/598.

LEE WAH LEONG & LEE WAH KI—HB.— ex SS. "Shinyo Maru." 9/3/19. 9/24/19.

Q. Then did you see them in Honolulu after that?

A. Yes, Their father asked me to go to their house and I went there. He was living next to the Ho Wong temple and I saw them.

- Q. Where was the Ho Wong temple?
- A. On Beretania Street, opposite Maunakea Street, in a lane, but I don't know the name of the lane.
 - Q. Who was their father?
 - A. Lee Hin Kwai, alias Lee Jung Ping.
 - Q. Is he living now? A. No.
 - Q. What was the name of these boys' mother?
 - A. Lum She. She died before her husband.
 - Q. Where did Lee Hin Kwai die?
- A. Honolulu. Also, their mother died in Honolulu.
- Q. Did Lee Hin Kwai have any other children except these two boys?
 - A. No, that is all they had.
 - Q. When did they go to China?
- A. About six months later I came to Honolulu and the father told me his wife had died and the two boys were sent back to China.
 - Q. Do you know who took them to China?
- A. Their father told me that Lee Wah Chan, a distant relative, took them to China.
 - Q. Did you know Lee Wah Chan? A. Yes.
 - Q. Did he come back to Hawaii from China?
 - A. No.
- Q. What was Lee Hin Kwai's occupation on Maui? A. Raising pigs.
- Q. What was his occupation when he came to Honolulu?
- A. Nothing, at that time his wife was sick and he sold his pig ranch and came to Honolulu. After

his wife died he went to work at Aiea Sugar Plantation.

- Q. That is the nearest plantation to Honolulu, is it? A. Yes, 7 miles.
- Q. Then after a while the father himself died, did he? A. Yes.
 - Q. Did he ever go to China before he died?
 - A. No.
- Q. Can you tell what steamer the boys went to China on?
 - A. It was so long ago I have forgotten.
- Q. When did you come to Honolulu from Waipahu? At the time their father told you they had gone to China?
 - A. In the latter part of KS. 33 (1907).
- Q. Then they must have gone to China in KS. 33? A. Yes.
- Q. Of course you have not seen either of them since they went to China?
- A. No, I have not been to China myself and they have not come back to Hawaii until now.
- Q. Then all you can say is that there were two boys having the names given by the two boys who have arrived, who were children of Lee Hin Kwai, who were born in Hawaii and went to China?
- A. Yes, I know he had two sons in Hawaii who went to China.
 - Q. Could you identify the two boys now?
 - A. No they have grown.
 - Q. Would you like to look at the boys?
 - A. No, I am old and cannot recognize them.

- Q. Perhaps you can tell whether they look like their father, or their mother. A. No, I cannot tell.
 - Q. Have you any further statement to make?
 - A. Not unless you have some questions to ask.
- Q. Did their father come from the same village in China that you did?
 - A. Yes, but from a different part of the village.
- #4382/598 Lee Wah Leong & Lee Wah Ki—HB. ex SS. "Shinyo Maru," 9/3/19. 9/24/19. [44]

#4382/598.

LEE WAH KI & LEE WAH LEONG—HB.—ex SS. "Shinyo Maru." 9/3/19. 9/24/19.

- Q. Did you know their father when he was in China before he came to Hawaii? A. Yes.
 - Q. When did he come to Hawaii?
 - A. He came before I did.
 - Q. And you came in KS. 6?
 - A. Yes. I think he came in KS. 4 (1878).
 - Q. When did his wife come to Hawaii?
- A. I think his wife came in KS. 28 or 29. (1902 or 1903).
 - Q. That was after annexation, was it?
- A. Yes. It was after he started that pig ranch. Then he sent for his wife.
- Q. Did he go back to China again after he came here in KS. 4?
- A. Yes. He went to China and got married, but did not go again after that.
 - Q. Did his wife come back with him?

- A. No, his wife came later.
- Q. How could his wife have been admitted?
- A. He had a pig ranch.
- Q. Would the owner of a pig ranch be a merchant? A. I don't know how she came.

NOTE: No record of Lum She, wife of any man named Lee, can be found in our records as having arrived in Hawaii from December, 1898, to the time applicants are alleged to have gone to China.

- Q. Do you know when Lee Hin Kwai went to China to get married?
- A. I think in KS. 15 or 16, but am not sure. (1889 or 1890).
 - Q. You think his wife came in KS. 28 or 29?
- A. Yes, about that time but I am not sure. Of course I was not staying on Maui at that time.
 - Q. Have you any further statement to make?
 - A. No, that is all.

Tracing of signature:

#4382/598 Lee Wah Ki & Lee Wah Leong—HB.
—ex SS. "Shinyo Maru." 9/3/19. 9/24/19.

#4382/598 Lee Wah Ki & Lee Leong. [45] #4382/598.

LEE WAH KI & LEE WAH LEONG—HB.—ex SS. "Shinyo Maru." 9/3/19. 9/24/19.

Witness sworn, testifies: CR. #910, verified Oct. 21, 1918.

Q. What is your name and age?

- A. Lum Koy, alias Lum Lun Ng; 38 years old. (Family record on file.)
- Q. What is the purpose of your coming here to-day?
- A. I come to testify for Lee Wah Leong and Lee Wah Ki.
 - Q. When did you first see them?
 - A. This year, in China.
- Q. Didn't you ever see either of them before this year? A. No.
 - Q. Where did you see them?
- A. They came to my house about the fourth month of this year.
 - Q. Where is your house?
 - A. At Dai Char village, China.
 - Q. How is it that they came to your house?
- A. They came to my house and asked me when I was going back to Hawaii.
 - Q. When did you leave Hawaii to go to China?
 - A. In September, 1918.
 - Q. When did you return to Hawaii?
 - A. This year.
 - Q. Did they just come to your house once?
 - A. Yes, once.
 - Q. Who came with them?
 - A. Just the two boys. No one came with them.
 - Q. The two boys came together, did they?
 - A. Yes.
 - Q. Did you ever see them at any other time?
- A. Then I went to my mother-in-law's house at Lee Yuk Bin and saw them again.

- Q. Did you see them any more? A. No.
- Q. You never saw either of them when they were in Hawaii? A. No.
 - Q. Do you know where these boys were born?
 - A. My wife told me they were born in Hawaii.
 - Q. Is your wife any relation to them? A. No.
 - Q. From what village did your wife come?
 - A. Lee Yuk Bin.
- Q. In what village were these boys living in China? A. Lee Yuk Bin.
 - Q. Is your wife in China now? A. Yes.
 - Q. Was she ever in Hawaii? A. No.
- Q. How does your wife know that these boys were born in Hawaii?
- A. She was in Lee Yuk Bin village and her aunt told her that the two boys were born in Hawaii and that they had no parents.
 - Q. Who is her aunt?
 - A. It was the boys' aunt that told my wife.
 - Q. What is her name? A. I do not know.
- Q. You say their aunt told your wife, did the aunt tell you?
 - A. She told my wife and my wife told me.
- Q. Did the boys themselves say they were born in Hawaii? A. Yes,
- Q. Did they ask you if you would be a witness for them when they came here? A. No not that.
- Q. When you returned from China by the SS. "Siberia Maru" in August of this year, you were asked whether you say any resident of this country or the son of any resident or farmer resident during

your recent stay in China, and you said, "No, with the exception of Chun Tong Chee at Sun Hee, and Chun Gut Tong, also at Sun Hee," and you said that was all. (Witness is shown the record.)

(It is in File No. 4380–987). If you saw these two boys at least twice and they visited your house, why did you not mention them?

- A. I did not think of them.
- Q. Did you ever see the father or mother of these boys? A. No.
 - Q. Did you visit their house in China? A. No.
- Q. In fact, you didn't know anything about them until this year?
 - A. No, I just knew them this year.
- #4382/598 Lee Wah Ki—Lee Wah Leong—HB. ex SS. "Shinyo Maru." 9/3/19. 9/24/19. [46]

#4382/598.

LEE WAH KI & LEE WAH LEONG—HB.—ex SS. "Shinyo Maru." 9/3/19. 9/24/19.

Q. Can you identify them? A. Yes.

(The witness identifies the applicants. The applicants state that they know the witness but are unable to give his name.)

Q. Have you any further statement to make? A. No.

Tracing of signature.

#4382/598 Lee Wah Ki & Lee Wah Leong— HB.—ex SS. "Shinyo Maru." 9/3/19. 9/ 24/19. [47] #4382/598.

LEE WAH KEE and LEE WAH LEONG— HB.—ex SS. "Shinyo Maru." Sept. 3, 1919. October 6, 1919.

EDWIN FARMER.—I move that the applicants be denied admission to this country and returned to the country from which they came, China, as Chinese persons who have not satisfactorily proved that they were born in the United States and have not shown that they are in any way entitled to enter the United States as exempt persons under the Chinese Exclusion Laws.

RICHARD L. HALSEY.—I second the motion. HARRY B. BROWN.—I concur. (To applicants.) You have been denied admission to the United States as Chinese aliens not entitled to enter this country under the Chinese Exclusion Laws. From this decision you have the right to appeal to the Secretary of Labor. If you desire to appeal you should notify the Inspector in Charge to that effect within 48 hours. You can appeal either with or without an attorney if you so desire. If you do not appeal, or if you appeal and are denied, you will be returned to China at the expense of the steamer on which you came in the same class as that in which you came, namely, the Asiatic steerage.

HARRY B. BROWN,
EDWIN FARMER,
RICHARD L. HALSEY,
Board of Special Inquiry.

#4382/598 Lee Wah Ki & Lee Wah Leong— HB.—ex SS. "Shinyo Maru." 9/3/19. 10/6/19. [48]

United States District Court for the Territory of Hawaii.

In the Matter of the Application of CHING YAM SING for a Writ of Habeas Corpus in Behalf of LEE WAH LEONG and LEE WAH KI.

Order to Show Cause.

The United States of America: To RICHARD L. HALSEY, Inspector in Charge of Immigration at the Port of Honolulu:

A petition for a writ of habeas corpus having been filed by Ching Yam Sing in behalf of Lee Wah Leong and Lee Wah Ki and this day presented to me, alleging unlawful restraint of liberty of said Lee Wah Leong and Lee Wah Ki by you, a copy of which petition is ordered to be served upon you with this writ, you are hereby ordered to be and appear before me in the courtroom of this Court at Honolulu, on Tuesday, the 9th day of December, 1919, at 10 o'clock A. M., to show cause, if any you have, why said writ of habeas corpus should not issue as prayed for in said petition.

Done at Honolulu this 4th day of December, A. D. 1919.

(Sgd.) HORACE W. VAUGHAN,
Judge of said Court.
Attest: A. E. HARRIS,
Clerk of said Court.
By (Sgd.) Wm. L. Rosa,
Deputy Clerk.

AT CHAMBERS—Jan. 24, 1920.

Let the writ of habeas corpus issue, returnable Tuesday, Jany. 27th, 1920.

(Sgd.) HORACE W. VAUGHAN, Judge. [49]

#152. In the United States District Court in and for the Territory of Hawaii. In the Matter of the Application of Ching Yam Sing for a Writ of Habeas Corpus in Behalf of Lee Wah Leong and Lee Wah Ki. Return of Richard L. Halsey, Respondent, to Order to Show Cause. Attorneys for Respondent: S. C. Huber, United States Attorney. N. D. Godbold, Assistant United States Attorney. Filed Dec. 8, 1919. A. E. Harris, Clerk. By (Sgd.) Wm. L. Rosa, Deputy Clerk.

Due and legal service of the above return is hereby accepted and the receipt of a copy thereof acknowledged. All done this 8th day of December, 1919.

WATSON & CLEMONS, By (Sgd.) C. F. CLEMONS, Attorneys for Petitioners. [50] In the United States District Court in and for the Territory of Hawaii.

In the Matter of the Application of CHING YAM SING for a Writ of Habeas Corpus in Behalf of LEE WAH LEONG and LEE WAH KI.

Return of Richard L. Halsey, Respondent, to Order to Show Cause.

Comes now Richard L. Halsey, Inspector in Charge of Immigration at the Port of Honolulu, Territory of Hawaii, respondent herein, and in obedience to the order to show cause heretofore issued in this case, in return thereto, respectfully says:

- 1. That he is and has been for more than seven (7) years past Inspector in Charge of the United State Immigration Service at the Port of Honolulu, Territory of Hawaii, and is the respondent in this case.
- 2. That he denies each and every paragraph and allegation contained in said petition, except as hereinafter admitted.
- 3. That he admits paragraph one and eleven of said petition.
- 4. That he denies that the said Lee Wah Leong and Lee Wah Ki are citizens of the United States of America, born on the Island of Maui, in the Hawaiian Islands, but alleges that said Lee Wah Leong and Lee Wah Ki are Chinese persons with-

out status entitling them to enter the United States.

- 5. That he denies that the said Lee Wah Leong and Lee Wah Ki are imprisoned and unlawfully restrained of their liberty [51] without authority of law by this respondent, but alleges that they are lawfully held in detention by authority of law by this respondent at the United States Immigration Station at Honolulu, Territory of Hawaii.
- 6. That he admits that the said Lee Wah Leong and Lee Wah Ki are not imprisoned under any process, judgment, decree or execution of any court, but alleges that they are held in detention under a decision or order of a competent tribunal regularly constituted according to law, namely, a Board of Special Inquiry lawfully appointed to pass upon the admissibility of aliens into the United States, which said decision or order is affirmed and approved by the Secretary of Labor of the United States on appeal.
- 7. The true cause of the detention of the said Lee Wah Leong and Lee Wah Ki is, they arrived at the Port of Honolulu from China on the steamer "Shinyo Maru" on the 3d day of September, 1919, and applied for admission to the United States, claiming to be citizens of the United States by reason of having been born in the Hawaiian Islands and therefore entitled to admission, although persons of the Chinese race who would be excluded from the United States were they aliens; but upon a full, fair and complete investigation at which they

were given ample opportunity to establish their citizenship and prove that they were born in the Hawaiian Islands, and after due consideration, they failed to prove their citizenship and were denied admission to the United States by said Board of Special Inquiry and ordered returned to China, the country from which they came, as Chinese persons who had failed to establish the status entitling them to admission, which said excluding decision and order was approved by the Secretary of Labor on appeal. A copy of the [52] proceedings of the Board of Special Inquiry with all the evidence on which the excluding decision was based is attached to and made a part of this return and marked "Exhibit "A."

- 8. That the respondent denies that the order of said Board of Special Inquiry and of the Secretary of Labor was based upon an unfair hearing and that it was a mere semblance of a hearing, but alleges that the said hearing was fair in every respect and was not the mere semblance of a hearing.
- 9. That he denies that the said Lee Wah Leong and Lee Wah Ki established a prima facie case of citizenship and are entitled to have the legality of their detention and restraint determined by a judicial tribunal, but asserts that they failed entirely to establish their citizenship, and that their case was fully and fairly heard by the proper tribunal established, appointed and constituted in accordance with law, namely, the said Board of Special Inquiry, and hence this court has no jurisdiction to

inquire further into the legality of their detention and restraint.

- 10. That he denies that the said Lee Wah Leong's and Lee Wah Ki's showing at said hearing was such as to establish a prima facie case and was such that there was no reason to doubt the fact of their identity as the persons born in Hawaii who they claimed to be, but alleges that many facts, circumstances and features of the case as shown by the record hereto attached fully justified said Board of Special Inquiry in holding that the said Lee Wah Leong and Lee Wah Ki failed to establish their identity with any persons born in Hawaii.
- 11. That he denies that any unfairness is shown by the [53] record on said hearing, that the said Board of Special Inquiry based their ruling on alleged discrepancies which were trivial and inconsequential and immaterial matters and on alleged discrepancies and uncertainties which were developed by their own unfair, incomplete and unthorough examination of witnesses; that there was any unfair examination of witnesses; that any of the real discrepancies on which they based their finding were fairly explained; that they did not give the said Lee Wah Leong and Lee Wah Ki and their witnesses full opportunity to explain all material discrepancies on which they relied; but he alleges that there were discrepancies and uncertainties which the said Le Wah Leong and Lee Wah Ki and their witnesses were unable to explain after having heen given a fair opportunity to do so, that if there

are any minor and unimportant discrepancies in said record they were not taken into consideration by said Board of Special Inquiry, and that there were other discrediting features of the case besides discrepancies on which the said Board relied.

12. That he denies that the said Lee Wah Leong and Lee Wah Ki made out a prima facie case before said Board; that said Board insisted that the said Lee Wah Leong and Lee Wah Ki produce more witnesses; but alleges that after all the witnesses had been produced the said Board gave to the said Lee Wah Leong and Lee Wah Ki the opportunity to produce more in order to be just and fair, so that they might perhaps establish their Hawaiian birth by other witnesses if they had any after they had failed to so by those produced at first, or that some of the discrepancies might be explained, and further more, because the Rules established by the Department of Labor governing the [54] admission of Chinese require that after a case has been taken the Board of Special Inquiry, if not fully satisfied of the admissibility of the applicant, shall give him an opportunity to produce further witnesses and to adduce more evidence. The said Board would not have denied the applicants admission because of the lack of knowledge of the additional witnesses if the evidence of the witnesses first produced had been satisfactory. The weight of evidence is for the Board to determine and the allegation of the said Lee Wah Leong and Lee Wah Ki that the

Board did not give due weight to any portion of the evidence is immaterial so long as the hearing was not unfair. The respondent alleges that there is nothing in the record to show unfairness on the part of the Board.

WHEREFORE, this respondent prays that the said Lee Wah Leong and Lee Wah Ki be denied a writ of habeas corpus and that they be allowed by this Honorable Court to remain in the custody of the respondent to be deported to China acording to law.

(Sgd.) RICHARD L. HALSEY.

United States of America, Territory of Hawaii,—ss.

Richard L. Halsey, being first duly sworn according to law, deposes and says, that he is the Richard L. Halsey who has made the foregoing return to the order to show cause in the above-entitled cause; that he has read the return and knows the contents thereof, and that the facts therein stated are true.

(Sgd.) RICHARD L. HALSEY.

Subscribed and sworn to before me this 8th day of December, A. D. 1919.

(Sgd.) WM. L. ROSA,

Deputy Clerk, United States District Court, Territory of Hawaii. [55]

(From the Minutes of the United States District Court, Territory of Hawaii.)

Tuesday, December 9, 1919.

(Title of Court and Cause.)

Minutes of Court—December 9, 1919—Hearing.

On this day came Mr. Charles F. Clemons, of the firm of Watson & Clemons, counsel for the applicant herein, and also came Mr. S. C. Huber, United States Attorney, counsel for the respondent, and this cause was called for hearing on return to the order to show cause. Thereupon and after due hearing and argument by counsel, the cause was taken under advisement by the Court.

HORACE W. VAUGHAN, District Judge presiding. [56]

(From the Minutes of the United States District Court, Territory of Hawaii.)

Friday, February 13, 1920.

(Title of Court and Cause.)

Minutes of Court—February 13, 1920—Hearing (Continued).

On this day came Mr. Charles F. Clemons, of the firm of Watson & Clemons, counsel for the above-name applicant, and also came Mr. S. C. Huber, United States Attorney, counsel for the respondent herein, and this cause was called for hearing, Thereupon Lau Wah and Lee Wah Koon were called and sworn and gave testimony on behalf of

the applicant herein. Thereafter Mr. Edwin B. Farmer was called and sworn and gave testimony on behalf of the applicant. Thereafter, with the consent of counsel, it was by the Court ordered that this cause be continued until called for further hearing.

HORACE W. VAUGHAN, District Judge presiding. [57]

(From the Minutes of the United States District Court, Territory of Hawaii.)

Friday, March 5, 1920.

(Title of Court and Cause.)

Minutes of Court — March 5, 1920 — Hearing (Continued).

On this day came Mr. Charles F. Clemons, of the firm of Wason & Clemons, counsel for the above-name applicant, and also came Mr. S. C. Huber, United States District Attorney, counsel for the respondent herein, and this cause was called for further hearing. Thereupon Chu Gem was called and sworn and gave testimony on behalf of the applicant herein, Lau Wah was recalled and gave further testimony on behalf of said applicant. The counsel for applicant having rested, Edwin B. Farmer was recalled by Mr. Huber and giving further testimony on behalf of the respondent, Hee Kwong was called and sworn and gave testimony on behalf of said respondent. Claimant's Exhibit "A" and "B" were admitted in evidence, marked

and ordered filed. Mr. Clemons thereupon submitted the cause upon the record. Mr. Huber argued and thereafter it was by the Court ordered that Mr. Clemons be given five days within which time to file briefs.

J. B. POINDEXTER, District Judge presiding. [58]

(From the Minutes of the United States District Court, Territory of Hawaii.)

Friday, July 30, 1920.

(Title of Court and Cause.)

Minutes of Court—July 30, 1920—Hearing (Continued).

On this day came Mr. Charles F. Clemons, of the firm of Watson & Clemons, counsel for the applicant, and also came Mr. N. D. Godbold, Assistant United Attorney, on behalf of the respondent herein, and this cause was called for decision. Thereupon the Court rendered decision in favor of the respondent, ordering that the applicant be remanded to the custody of the respondent herein. Exception to said decision was entered by counsel for applicant and notice of appeal was given also.

J. B. POINDEXTER, District Judge presiding. [59]

Filed Jul. 31, 1920. A. E. Harris, Clerk. By (Sgd.) Wm. L. Rosa, Deputy Clerk.

In the United States District Court in and for the Territory of Hawaii.

In the Matter of the Application of CHING YAM SING for a Writ of Habeas Corpus in Behalf of LEE WAH LEONG and LEE WAH KI.

Judgment.

Now, to wit, on this 30th day of July, A. D. 1920, Court being in session, Honorable J. B. Poindexter, a Judge thereof presiding, the above-entitled matter came on for hearing in its regular order, Watson & Clemons appearing as attorneys for petitioner, and S. C. Huber, United States Attorney, and N. D. Godbold, Assistant United States Attorney, appearing as attorneys for respondent.

The Court having heretofore heard and considered the evidence offered in the case and having heard and considered the arguments of the respective counsel, and being duly advised in the premises, finds the facts as alleged by respondent in his return to be sustained; and finds that the immigrants Lee Wah Leong and Lee Wah Ki were given a fair hearing as provided by law and the rules of the Immigration Department; and that they were not denied any legal right;

It is therefore hereby ORDERED, ADJUDGED and DECREED that the writ of habeas corpus here-

tofore issued be, and hereby is [60] dismissed; and that the said Lee Wah Leong and the said Lee Wah Ki be and hereby are remanded to the custody of the respondent Richard L. Halsey, United States Immigration Inspector in Charge at the Port of Honolulu, Territory of Hawaii; and that petitioner pay the costs of this proceeding in the sum of \$-----.

(Sgd.) J. B. POINDEXTER,

Judge, United States District Court, Territory of Hawaii. [61]

In the United States District Court, Territory of Hawaii. In the Matter of the Application of Ching Yam Sing, for a Writ of Habeas Corpus in Behalf of Lee Wah Leong and Lee Wah Ki. Petition for Appeal. Filed Jul. 31, 1920. A. E. Harris, Clerk. By (Sgd.) Wm. L. Rosa, Deputy Clerk. [62]

In the United States District Court for the Territory of Hawaii.

In the Matter of the Application of CHING YAM SING for a Writ of Habeas Corpus in Behalf of LEE WAH LEONG and LEE WAH KI.

Petition for Appeal.

To the Honorable the Judge of said Court Presiding in Habeas Corpus Cases:

CHING YAM SING, the petitioner above named, in behalf of said Lee Wah Ki and Lee Wah Leong, conceiving himself aggrieved by the order and judg-

ment made and entered on the 31st day of July, 1920, in the above-entitled proceeding, does hereby appeal from the said order and judgment to the United States Circuit Court of Appeals for the Ninth Judicial Circuit of the United States, at San Francisco, in the State of California, and files herewith his assignment of errors intended to be urged upon appeal, and prays that his appeal may be allowed; and that a transcript of the record of all proceedings and papers upon which said order and judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit of the United States, at San Francisco, in the State of California.

Dated this 31st day of July, A. D. 1920.

CHING YAM SING,

Petitioner.

By WATSON & CLEMONS, By (S.) C. F. C. CLEMONS,

His Attorneys. [63]

Due and legal service of a copy of the foregoing petition for appeal is hereby acknowledged this 31st day of July, 1920.

RICHARD L. HALSEY,
Respondent.
By (Sgd.) S. C. HUBER,
United States Attorney, Hawaii. [64]

In the United States District Court for the Territory of Hawaii. In the Matter of the Application of Ching Yam Sing, for Habeas Corpus in

Behalf of Lee Wah Leong and Lee Wah Ki. Assignment of Errors. Filed July 31, '20. A. E. Harris, Clerk. By (Sgd.) Wm. L. Rosa, Deputy Clerk. Watson & Clemons, Attorneys for petitioner, 417 Kauikeolani Building, Honolulu, T. H. [65]

In the United States District Court for the Territory of Hawaii.

In the Matter of the Application of CHING YAM SING for a Writ of Habeas Corpus in Behalf of LEE WAH LEONG and LEE WAH KI.

Assignment of Errors.

The petitioner-appellant says that in the record and proceedings in the above-entitled matter there is manifest error, and that the final record and judgment made and entered in said matter on the 30th day of July, 1920, is erroneous and against the just rights of said petitioner in this, to wit:

I.

That the Court erred in discharging the writ, because it appears by the petition and record herein that the persons, Lee Wah Leong and Lee Wah Ki, in whose behalf said petition was filed, were entitled to enter the United States.

II.

That the Court erred in finding and holding that said Lee Wah Leong and Lee Wah Ki, and each of them, were not citizens of the United States.

III.

That the Court erred in finding and holding that said Lee Wah Leong and Lee Wah Ki, and each of them, were not born in the Territory of Hawaii. [66]

IV.

That the Court erred in making and entering decree herein in favor of the respondent and against the petitioner.

WHEREFORE, by the law of his land the writ of habeas corpus issued herein should have been made absolute and the petitioner have been discharged from custody and permitted to land and remain in the United States of America.

Dated this 30th day of July, A. D. 1920.

WATSON & CLEMONS,

Attorneys for Petitioner.

By (Sgd.) C. F. CLEMONS.

Received a copy of the above assignment of errors.

(Sgd.) S. C. HUBER,

U. S. Atty.,

Attorney for Respondent. [67]

In the United States District Court for the Territory of Hawaii. In the Matter of the Application of Ching Yam Sing, for a Writ of Habeas Corpus in Behalf of Lee Wah Leong and Lee Wah Ki. Bond on Appeal. Filed Jul. 31, 1920. A. E. Harris, Clerk. (S.) Wm. L. Rosa, Deputy Clerk. [68]

In the United States District Court for the Territory of Hawaii.

In the Matter of the Application of CHING YAM SING for a Writ of Habeas Corpus in Behalf of LEE WAH LEONG and LEE WAH KI.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS, that we, Ching Yam Sing, in behalf of Lee Wah Leong and Lee Wah Ki, as principal, and Ching Chow and Yuen Kwock, as sureties, all of Honolulu, City and County of Honolulu, Territory of Hawaii, are held and firmly bound unto the United States of America in the sum of Five Hundred Dollars (\$500), lawful money of the United States of America, for the payment of which well and truly to be made we bind ourselves and our, and each of our, heirs, executors and administrators, jointly and severally, firmly by these presents.

THE CONDITION OF THIS OBLIGATION IS SUCH THAT WHEREAS, a writ of habeas corpus has issued out of the above-entitled court, directed to Richard L. Halsey, Esquire, respondent, directing him to have and produce the body of the said above-named Lee Wah Leong and Lee Wah Ki before the said United States District Court in and for the District and Territory of Hawaii; and

WHEREAS, the question of the imprisonment and detention of the said Lee Wah Leong and Lee Wah Ki and their right to discharge under the said writ of habeas corpus has been submitted to the United States District Court in and for the District and Territory of Hawaii, and by that court decided adversely to the petitioner; and [69]

WHEREAS, the said Ching Yam Sing in behalf of said Lee Wah Leong and Lee Wah Ki has appealed from said decision and judgment of the District Court of the United States in and for the District and Territory of Hawaii to the United States Circuit Court of Appeals for the Ninth Judicial Circuit of the United States, at San Francisco, in the State of California,—

NOW, THEREFORE, if the said Ching Yam Sing, petitioner-appellant in behalf of said Lee Wah Leong and Lee Wah Ki, shall prosecute his appeal to effect and shall answer, and pay all costs to which the respondent-appellee in said appeal shall be entitled, if said petitioner-appellant fails to make good his said appeal, and if he shall pay all costs further to accrue or be chargeable against him on account of said appeal, and if he and the said Lee Wah Leong and Lee Wah Ki shall abide by and perform whatever judgment, decree, or/and order may be rendered or made by said Circuit Court of Appeals or on the mandate of said Circuit Court of Appeals, then this obligation shall be void; otherwise the same shall remain in full force and effect.

IN WITNESS WHEREOF the said principal and sureties have hereunto set their hands and seals at Honolulu, City and County of Honolulu, Territory of Hawaii, this 31st day of July, A. D. 1920. (Sgd.) CHING YAM SING, (Seal)

Principal.

(Sgd.) CHING CHOW,

(Sgd.) YUEN KWACK, (Seal)

Sureties. [70]

United States of America, Territory of Hawaii, City and County of Honolulu,—ss.

Ching Chow and Yuen Kwock, being first duly sworn on oath depose and say, each for himself and not one for the other, that they are property owners and resident of said Honolulu, and are each worth more than double the amount of the penalty of the foregoing bond or undertaking over and above their just debts and liabilities and property exempt from execution.

(Sgd.) CHING CHOW. (Sgd.) YUEN KWOCK.

Subscribed and sworn to before me this 31st day of July, 1920,

[Seal] (S.) J. R. KENNY,

Notary Public, First Judicial Circuit, Territory of Hawaii.

Approved as to form, amount and sufficiency of sureties.

(S.) J. B. POINDEXTER,

Judge, United States District Court, District of Hawaii.

(S.) S. C. HUBER,

United States District Attorney, District of Hawaii.

[71]

In the United States District Court, Territory of Hawaii. In the Matter of the Application of Ching Yam Sing for a Writ of Habeas Corpus in Behalf of Lee Wah Leong and Lee Wah Ki. Order Allowing Appeal. Filed Jul. 31, 1920. A. E. Harris, Clerk. By (Sgd.) Wm. L. Rosa, Deputy Clerk. [72]

In the United States District Court for the Territory of Hawaii.

In the Matter of the Application of CHING YAM SING for a Writ of Habeas Corpus in Behalf of LEE WAH LEONG and LEE WAH KI.

Order Allowing Appeal.

Upon the application and motion of Watson & Clemons, attorneys for the above-named petitioner;

It is hereby ordered that the petition for appeal heretofore filed herein by Ching Yam Sing, in behalf of Lee Wah Leong and Lee Wah Ki, be and the same is hereby granted; and that an appeal to the United States Circuit Court of Appeals for the Ninth Judicial Circuit of the United States, from the final order and judgment heretofore, on July 31st, 1920, filed and entered herein, be and the same is hereby allowed, and that a transcript of the record of all proceedings and papers upon which such final order and judgment was made, duly certified and authenticated, be transmitted, under the hand and seal of the Clerk of this Court, to the United States Circuit Court of Appeals for the Ninth Ju-

dicial Circuit of the United States at San Francisco, in the State of California.

Dated, this 31st day of July, 1920.

(Sgd.) J. B. POINDEXTER,

Judge of said Court. [73]

In the United States District Court for the Territory of Hawaii. In the Matter of the Application of Ching Yam Sing for a Writ of Habeas Corpus in Behalf of Lee Wah Leong and Lee Wah Ki. Notice of Filing of Bond on Appeal. Filed Aug. 9, 1920. (S.) Wm. L. Rosa, Clerk. [74]

In the United States District Court for the Territory of Hawaii.

In the Matter of the Application of CHING YAM SING for a Writ of Habeas Corpus in Behalf of LEE WAH LEONG and LEE WAH KI.

Notice of Filing of Bond on Appeal.

To Richard L. Halsey, Esq., Immigration Inspector in Charge at the Port of Honolulu, Respondent, and His Attorney, S. C. Huber, Esq., United States District Attorney:

You are hereby notified that the appellant, the petitioner above named, has filed in the United States District Court for the Territory of Hawaii, a bond in the sum of Five Hundred Dollars (\$500) in accordance with the rules of the United States

Circuit Court of Appeals for the Ninth Circuit, and the names and residences of the sureties who have executed said bond on appeal in this suit, a copy of which is attached hereto, and made a part hereof, are as follows:

Yuen Kwock, who resides at No. 1709 J. Center Drive, in Honolulu, Island of Oahu, said Territory, and does business at 1152 Nuuanu Street, said Honolulu (manager of Fong Inn Co.), and whose postoffice address is P. O. Box 999, Honolulu, Hawaii,

Ching Chow, who resides at No. 1127 Banyan Street, said Honolulu, and does business at No. 177 North King Street, said Honolulu (manager of Wing Hong Yuen Co.), and whose postoffice address is P. O. Box 1021, Honolulu, Hawaii, and they are the sureties on said bond filed in this court in this suit on [75] appeal from the final decree made and entered herein in the United States District Court for the Territory of Hawaii, and from which final decree the said petitioner-appellant has appealed and filed his notice of appeal.

Dated, Honolulu, Hawaii, this 4th day of August, A. D. 1920.

CHING YAM SING,
Petitioner-Appellant.
By WATSON & CLEMONS,
His Attorneys,
By (S.) C. F. CLEMONS. [76]

In the United States District Court for the Territory of Hawaii.

In the Matter of the Application of CHING YAM SING for a Writ of Habeas Corpus in Behalf of LEE WAH LEONG and LEE WAH KI.

Stipulation.

It is hereby stipulated and agreed by and between the parties hereto that in the record on appeal there may be substituted for the original exhibits herein (passenger list S. S. "Korea" ex Honolulu, April 29, 1907, and S. S. "Persia" ex Honolulu, June 25, 1907), for consideration by the Appellate Court on the petitioner's appeal, the transcript thereof hereto annexed; also that the annexed paragraph "9½" offered at the hearing may be regarded as added to the petition herein by amendment.

WATSON & CLEMONS,
E. M. WATSON,
C. F. CLEMONS,
By (Sig.) C. F. CLEMONS,
Attorneys for Petitioner-Appellee.
(Sig.) S. C. HUBER,
United States Attorney,
Attorney for Respondent-Appellant.

Approve:

(Sig.) H. B. POINDEXTER, Judge of said Court. [77] 9½. That said hearing before said Board was, also, unfair, in that said Board based their adverse finding in part on the fact of the absence of any showing of the coming of Lum Shee, the mother of said minors, to Hawaii, but said Board did not make a full and complete search of the steamship and other records, which show that said mother arrived at Honolulu in said Hawaii on the Steamship "Doric" on July 16, 1898; and that said hearing was also unfair in that the search made by said Board in said hearing was not sufficiently extensive, and in this behalf the petitioner refers to page of said Record. [78]

OATH TO OUTWARD PASSENGER LIST. District of Hawaii,

Port of Honolulu.

I, S. Sandberg, Master of the Am. S. S. "Korea," do solemnly, sincerely, and truly swear that the following List or Manifest, subscribed by me, and now delivered to the Collector of the Customs at the Port of Honolulu, is a full and correct List of all of the passengers taken on board the said vessel at Honolulu, from which port said vessel is now about to sail, and that on said List is truly designated the name, age, sex, calling of each of the said passengers, the country to which each belongs, the port of embarkation, and the number of pieces of baggage carried by each; and, in respect to emigrants, said List further shows the native country, the intended

destination, and the location of the space or compartment occupied by each. So help me God.

S. SANDBERG,

S. SANDBERG,
Master.

des.

Sworn to this 29th day of April, 1907, before me, (Seal)

M. H. DRUMMOND,

Deputy Collector of Customs.

LIST OR MANIFEST OF ALL THE PAS-SENGERS taken on board the Am. S. S. "Korea" whereof S. Sandberg is Master, from Honolulu; burthen tons.

Name	Yrs. M	o. Sex	Call-	Coun-	Bag-	Na-	Inten-	Lo-	
			ing	try of	gage	tive	ded	ca-	
				which	No	Coun-	desti-	tion	
				they	pieces	try of	nation	of	C
				are sev-		Emi-	or Lo-	Com-	d
				erally		grants	cation	part-	
				citizens				ment	
Wing	49	M	labor	China	4	China	Honkong	Asiatic	
Chee	47	66	66	"	6	44	66	66	
ng You	34	"	66	"	12	- 6	6.6	66	
s. Pong See	22	\mathbf{F}	wife	"	4	4.6	*6	66	
ng See (Infant)	6	M	infant	"		Hawaii	4.6	66	
ah Quan (boy)	3	66	Boy	"		66	61	46	
a Shin (girl)	2	\mathbf{F}	child	66		4.6	66	66	
n	42								
on So (infant)	1 mag								

nan Sa (infant) 4 mos.

han Sa (boy) 2 yrs. [79]

OATH TO OUTWARD PASSENGER LIST.

District of Hawaii,

Port of Honolulu.

I, Andrew Dixon, Master of the British S. S. "Persia," do solemnly, sincerely, and truly swear that the following List or Manifest, subscribed by me, and now delivered to the Collector of the Customs of the Port of Honolulu, is a full and correct List of all the passengers taken on board the said vessel at Honolulu, from which port said vessel is now about to sail, and that on said List is truly designated the name, age, sex, calling of each of the said passengers, the country to which each belongs the port of embarkation, and the number of pieces of baggage carried by each; and, in respect to emigrants, said List further shows the native country, the intended destination, and the location of the space or compartment occupied by each. So help me God.

A. DIXON,

Master.

Sworn to this 25th day of June, 1907, before me (Seal)

M. H. DRUMMOND,

Deputy Collector of Customs.

LIST OR MANIFEST OF ALL THE PAS-SENGERS taken on board the British S/S. "Persia" whereof Andrew Dixon is Master, from Honolulu; burthen tons.

Died on voyage and cause of death								
Lo- ca- tion of Com- part- ment	Asiatic		"	"	"	*)	"	3
Intended dedination or Lo-	Hongkong		"	3	**	\$	99	3
Na- tive Coun- try of Emi- grants	China		;	Намаіі	99	3	;;	3
Bage gage No pieces	eo .		00					
Country of which they are severally eitizens	China	Five intervening names omitted.	**	3	33	33	•	ä
call-	M labor	names	wife	infant	ehild	33	3	33
Age Yrs. Mo. Sex Call- ing	M	ening	된	M	<u>F</u> .	<u>F-</u>	M	3
Age rs. Mo.	38	interv	36	œ	œ	17	7	9
÷ :	•••	Five		fant)				ତ 1
Name	Lu Chung		Mrs. Chang Sec	Chang See (infant)	Ab Sim	Ah Sung	Ah ('hoy	Ah Wa [80]

In the United States District Court for the Territory of Hawaii.

In the Matter of the Application of CHING YAM SING for a Writ of Habeas Corpus in Behalf of LEE WAH LEONG and LEE WAH KI.

TRANSCRIPT OF TESTIMONY.

Judge HORACE W. VAUGHAN, Presiding. [81] Messrs. WATSON & CLEMONS, for the Applicants Herein.

S. C. HUBER, United States Attorney, for Respondent, Richard L. Halsey.

LAU WAH called, sworn.

Direct Examination by CHARLES F. CLEMONS.

- Q. Your name? A. Lau Wah.
- Q. You are of Chinese descent? A. Yes.
- Q. Are you not familiar, Lau Wah, with the Chinese language, both spoken and written, in several dialects? A. Yes.
- Q. At my request you made an examination of the steamship records at the Immigration Station covering several years around 1908 to see if you could discover the names of the two boys in behalf of whom this petition is brought, en route from Honolulu to China?

A. For the purpose of searching for the record of two boys by the name of Wah Kee and Wah Leong but I could not find any record showing these two names but I did find the names Wah Quan and Wah Shin.

Mr. CLEMONS.—Q. Did you look for boys of any particular age?

A. Yes, one three years old and the other two years and I found the names Wah Quan and Wah Shin.

Q. I gave you the testimony and record in this case for the Immigration Board so that you could see just what boys we wanted to find out about?

A. Yes, you did. [82]

Q. The nearest you could find was according to this statement?

"S/S. Korea left Port of Honolulu April 29, 1907.

Yong You age 34 years
Mrs. Pong See age 22 years
Infant age 6 months
Wah Quan age 3 years
Wah Shin age 2 years."

A. Yes.

The COURT.—Q. You said you searched some record; what record did you search?

A. I searched the records of the Steamship Company given me by Mr. Farmer and Mr. Halsey,—the records of the Steamship Company showing the passengers leaving the Territory during the years 1905, 1906, 1907 and 1908.

Q. For what country?

A. Leaving for Hong Kong.

Q. So the records you were searching were those containing the names of passengers departing from Honolulu for Hong Kong? A. Yes.

Mr. CLEMONS.—If your Honor pleases, at the time in question the rules required that duplicate of the records of the Steamship Company be filed, one for the Customs and one for the Immigration Station, I believe, and Mr. Farmer produced a record, not the one which Lau Wah examined, but produced another one.

The COURT.—Supposed to be a copy of the one Lau Wah saw?

A. I don't know; this one shows that one of the parties was a girl and not a boy; the other record shows two boys, and there was a column to indicate the birth place of each passenger.

Mr. CLEMONS.—Q. The name Wah, is that the name of a boy or a girl?

A. It is the name of a boy. It is the Chinese custom, and any Chinese here could tell you the same that boys' names are not given to girls. [83]

Q. So these names Wah Quan and Wah Shin are the names of boys? A. Yes.

The COURT.—Q. If I understand you, the name "Wah" is a name that is given to boys only and not to girls? A. Yes.

Mr. CLEMONS.—Q. Now, Lau Wah, regarding the incoming passenger list, you went to the Archives, did you not, to find the name of the mother of the two boys?

A. The name in the record and also the testimony you told me to look up was that the mother came here before annexation, so I went down to find the woman's name, Lum She, and found also a record showing that that woman came here to join her husband; that was exactly the testimony given in your office by some of the witnesses.

The COURT.—Q. You went to the Archives?

A. Yes.

Q. What Archives?

A. The public Archives in the Capitol grounds.

Mr. CLEMONS.—Q. Mr. Lydecker's office?

A. Yes.

Q. Referring to this, could you state the name of the boat and the date?

A. I found on that record that the S/S. "Doric" arrived here July 16, 1898, and that Lum She was on it, 23 years old, coming to join her husband.

Q. Does that age correspond with the age of the one in the record?

A. I don't know; according to the testimony given by one or two witnesses in your office a man by the name of Lee Lum or Lee Tim Po came with the mother and I also found that name on the passenger list. [84]

Mr. HUBER.—I object to that statement.

Objection sustained.

Mr. HUBER.—Q. How many Lum Shes did you note?

A. Well, Lum She is generally a woman's name, a woman's first name, a temporary name.

Mr. HUBER.—The mere fact that you found the name Lum She would not indicate any particular Lum She any more than Smith, Jones, or a name of that kind would.

Mr. CLEMONS.—This is the Lum She that came to join her husband and came at the time corresponding to the statement in the record; that is so, is it not?

A. Yes.

Mr. HUBER.—Q. What is the statement in the record, Lau Wah?

A. The testimony told by some witnesses.

Mr. HUBER.—Q. You found that this Lum She came in what year?

A. 1898.

Mr. HUBER.—Q. Now, isn't it true that the record in this case shows that she came to Honolulu in 1902 or 3?

Mr. CLEMONS.—Without stating details, Lau Wah, did you look for the Lum She who corresponded with the testimony in this record?

Mr. HUBER.—I object to that question as incompetent, irrelevant and immaterial.

The COURT.—Let him state what he was looking for in the record. [85]

Mr. HUBER.—If the Court please, I think we can simplify this by stating that a Lum She came to Hawaii at the time he testifies—that a Lum She came to Hawaii in 1898, came to join her husband—I am willing to admit that.

The COURT.—If I understand you, Lum She simply means Mrs. Lum—it is not like Mary in Mrs. Mary Smith, just Mrs. Smith. According to the Chinese custom they simply call her by her husband's name. You were searching the record to find out whether Mrs. Lum came to Hawaii; the substance of your testimony is that you did find from the record that a Mrs. Lum did come to this Territory on July 16, 1898, to join her husband. Now, let me understand the testimony as to the boys: You were searching the records that are made up by the Steamship Company for the purpose of finding out whether or not two boys, of names such as those of the boys in this case, left Hawaii at any time during the years 1905, 6, 7, and 8; that was why you were searching the record of the Steamship Company? A. Yes.

- Q. What record did you search?
- A. The record kept at the Immigration Station.
- Q. Now, about this name Wah given to boys only; don't the Chinese sometimes name a girl Wah? Have you ever known of a girl named Wah?
- A. No, Wah is a boy's name: the Chinese believe in idols and they always name the boys that one word and the girls with one word; they never name a girl the same as a boy.
 - Q. They give their children only one name?
 - A. Yes.
- Q. They do not give them two names the first time, and they never give a girl a boy's name?
 - A. No.

- Q. It is the Chinese custom to take on other names at various times in life but the name given to a child is only one name [86] as I understand it. A. Yes.
- Q. Do they give two boys in the same family the same name? A. Yes, but not a girl and a boy.
- Q. If a boy is born and they name him Wah—well, suppose another boy is born two years later, do they name him Wah also?

A. Yes; they may name him Wah Lee but afterwards if a girl is born they would not use the Wah; they generally use some girl's name.

Mr. HUBER.—Q. The two names that you found are Wah Quan and Wah Shin? A. Yes.

Mr. FARMER (to Lau Wah).—Q. Do I understand you, Lau Wah, to say that the other record is the same as this except that the two children are shown as boys?

A. Yes. The other record shows that both are boys; at the top of the page is the letter "M" which means male.

The COURT.—Q. If I understand you, you also state that you found the statement that they were born in Hawaii? A. Yes.

Then, this book right here is another copy?

Mr. HUBER.—There are two records made by the same officer, one filed with the Customs and one by the Immigration.

HEE KWONG called, sworn.

The COURT.—You want to prove by Hee Kwong that a man by the name of Lee Lum came to Hawaii at the same time as Lum She?

Mr. HUBER.—I am willing to admit that this witness could testify that he knew or heard that Lee Lum came over on the same boat with Lum She. [87]

The COURT.—Let the record show that his witness appeared and testified that a man by the name of Lee Lum came to Hawaii at the same time as Lum She, the alleged mother of these boys. Let the record also show that this man could testify that he is a cousin of these two boys on whose behalf this writ is made. Now, I understand that you agree to produce the record before the Court that was referred to by the witness, Lau Wah, and agree upon a statement to be incorporated in the record in this case as a part of the testimony?

Mr. CLEMENS.—Yes.

Mr. HUBER.—Now, if the Court please, I would like to take Mr. Farmer's testimony.

Mr. EDWIN FARMER called, sworn.

- Q. What is your name? A. Edwin Farmer.
- Q. What official position, if any, do you hold?
- A. Immigration inspector.
- Q. At the Port of Honolulu? A. Yes.
- Q. How long have you held such position?
- A. For nearly ten years.
- Q. Mr. Farmer, I present to you this record and ask you to state to the Court what the record is, confining particularly to the page now before you or the record of which that page is a beginning.

A. The book is one in which we have placed passenger lists of steamers departing.

The COURT.—Q. By whom is it kept?

- A. It is kept by the Collector of Customs. [88]
- Q. By whom is it made out?
- A. It was made out by the Steamship Company and sworn to by the captain of the steamer and filed with the Customs' people.
 - Q. Showing what?
- A. Showing the names and ages and other information of all persons leaving the Port of Honolulu for the foreign port to which the vessel is going.

Mr. HUBER.—Q. Now, the page open before you is what?

- A. It is a portion of the record of the S/S. "Korea" which departed on April 29, 1907.
 - Q. Departed from where?
 - A. From the Port of Honolulu.
- Q. Is this book and the records it contains a part of the official records of the Immigration Station at Honolulu?
- A. Yes, I might say that the custody of this book was transferred to us by the Customs-house by order of the Secretary of the Treasury and the Secretary of Labor.
- Q. Now, Mr. Farmer, another and different record, presumably covering information as to passengers on this same voyage, has been referred to by the witness, Lau Wah. State, if you know, what the nature of that record is?
- A. I don't know for certain what record the witness, Lau Wah, referred to, but I am well satisfied that he referred to another record somewhat similar to this which was a record of steamers departing from the Port of Honolulu to various ports, which

was required to be filed with the Immigration Inspector in charge of Immigration at this Port. For some time this record was filed with the Customs and another record of departing passengers was filed with the Inspector of Immigration so that for several years there were two records; [89] there were various changes made in regard to the rules and regulations concerning these records and I cannot state from memory exactly what all the rules and regulations were except that I know this fact; that the records were in duplicate for several years or partially in duplicate, because I know at one time that it was only aliens who were departing passengers whose names had to be filed with the Immigration Department, but as I say, there were various changes in these rules and they were changed quite often and I could not say what the rules were at this particular time, but whatever the record is I am sure that I can find it at the Immigration Station.

Mr. HUBER.—Q. Mr. Farmer, you have stated that while you are not certain that the record referred to by the witness, Lau Wah, is what you have characterized as a duplicate record to be filed with the Immigration people at the same time as this record was filed with the Customs, that you believe it is.

Mr. CLEMONS.—I would prefer that Judge Vaughan see the other record. Mr. Farmer, you gave me a certain record to look through, did you not, while Lau Wah was down there. Whatever

books he looked at, they were books that you furished him to see?

A. Yes. The reason that I gave them to him was because the Customs-house records were full and complete whereas the Immigration records were not full and complete at all times. [90]

I hereby certify that the foregoing transcript is a true and correct and full transcript of the evidence and proceedings taken in the above-entitled matter in re Ching Yam Sing, transcribed from the stenographic notes taken by me in open court.

IN WITNESS WHEREOF I hereby set my hand this 23d day of December, 1920.

(Sgd.) MARGUERITE RAWLEY. [91]

In the United States District Court for the Territory of Hawaii. In the Matter of the Application of Ching Yam Sing for a Writ of Habeas Corpus in Behalf of Lee Wah Leong and Lee Wah Ki. Citation on Appeal. Filed July 31, '20. A. E. Harris, Clerk. By Wm. L. Rosa, Deputy. [92]

In the United States District Court for the Territory of Hawaii.

In the Matter of the Application of CHING YAM SING for a Writ of Habeas Corpus in Behalf of LEE WAH LEONG and LEE WAH KI.

Citation on Appeal.

United States of America,—ss.

The President of the United States, to RICHARD L. HALSEY, Immigration Inspector in Charge at the Port of Honolulu, Respondent, GREET-ING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to an order allowing an appeal, filed in the clerk's office of the United States District Court for the Territory of Hawaii, wherein Ching Kam Sing is appellant, and you, Richard L. Halsey, are appellee, to show cause, if any there be, why the judgment in said appeal mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable EDWARD DOUG-LAS WHITE, Chief Justice of the Supreme Court of the United States of America, this 31st day of July, 1920, and of the Independence of the United States the one hundred and forty-fourth.

> J. B. POINDEXTER, Judge, U. S. District Court. Attest: WM. L. ROSA,

> Clerk, U. S. District Court.

[Seal]

Honolulu, July 31st, 1920.

Received a copy of the within citation July 31st, 1920.

RICHARD L. HALSEY,
Inspector as Aforesaid,
By S. C. HUBER,
His Attorney. [93]

In the United States District Court for the Territory of Hawaii.

In the Matter of the Application of CHING YAM SING for a Writ of Habeas Corpus in Behalf of LEE WAH LEONG and LEE WAH KI.

Praecipe for Transcript of Record.

To the Clerk, United States District Court for the Territory of Hawaii:

You will please prepare transcript of the record in the above-entitled matter, to be filed in the office of the Clerk of the Circuit Court of Appeals for the Ninth Circuit at San Francisco, and include therein the following pleadings, papers and proceedings, to wit:

- Petition for writ of habeas corpus, with record of immigration proceedings annexed thereto.
- 2. Order to show cause.
- 3. Return of respondent to order to show cause.
- 4. Judgment.
- 5. Petition for appeal.
- 6. Assignment of errors,
- 7. Bond on appeal.

- 8. Order allowing appeal.
- 9. Notice of filing bond on appeal.
- 10. Exhibits.
- 10a. Stipulations.
- 11. Clerk's minutes of proceedings.
- 11a. Transcript of testimony.
- 12. Citation on appeal.
- 13. This praccipe.

Said transcript to be prepared and filed as required by law and the rules of the Circuit Court of Appeals for the Ninth Circuit.

CHING KAM SING,
By WATSON & CLEMONS
His Attorneys.
By (Sgd.) C. F. CLEMONS. [94]

In the District Court of the United States in and for the District and Territory of Hawaii.

No. 152.

In the Matter of the Application of CHING YAM SING for a Writ of Habeas Corpus in Behalf of LEE WAH SING and LEE WAH KI.

Certificate of Clerk U. S. District Court to Transcript of Record.

I, Wm. L. Rosa, Clerk of the District Court of the United States for the Territory of Hawaii, do hereby certify that the foregoing pages, numbered from 1 to 94, inclusive, to be a true and complete transcript of the record and proceedings had in said court in the matter of the application of Ching Yam Sing, for a writ of habeas corpus in behalf of Lee Wah Sing and Lee Wah Ki, as the same remains of record and on file in my office, and I further certify that I hereby annex the original citation on appeal and twelve orders extending time to transmit record on appeal in said cause.

I further certify that the cost of the foregoing transcript of record is \$32.95 and that the applicant in this cause has paid said amount.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said court this 10th day of August, A. D. 1921.

[Seal] ; WM. L. ROSA, Clerk United States District Court, Territory of Hawaii. [95]

[Endorsed]: No. 3775. United States Circuit Court of Appeals for the Ninth Circuit. Ching Kam Sing, Appellant, vs. Richard L. Halsey, as Immigration Inspector in Charge at the Port of Honolulu, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Territory of Hawaii.

Received August 23, 1921.

F. D. MONCKTON,

Clerk.

Filed September 21, 1921.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien, Deputy Clerk.



No. 3675

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FRANK P. HELM,

Plaintiff in Error,

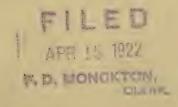
VS.

American Hawaiian Steamship Company (a corporation),

Defendant in Error.

PETITION FOR A REHEARING ON BEHALF OF PLAINTIFF IN ERROR.

NATHAN H. FRANK,
IRVING H. FRANK,
Merchants Exchange Building, San Francisco,
Attorneys for Plaintiff in Error
and Petitioner.





IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FRANK P. HELM,

Plaintiff in Error,

VS.

American Hawaiian Steamship Company (a corporation),

Defendant in Error.

PETITION FOR A REHEARING ON BEHALF OF PLAINTIFF IN ERROR.

To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

It is with great diffidence and regret that I am imposing upon the patience of the court in this matter, but I feel that the prevailing opinion proceeds not only upon an erroneous view of the case, but also fails to give consideration to some of the essential points contained in the record for review. I regret exceedingly that my illness prevents me from presenting the matter as completely as I desire, but in order to keep faith with the court in the promise, that I understand was made at the

time of the last extension of time to file this petition, I am rushing this incomplete, and to me not entirely satisfactory petition, in the hope that I may possibly supplement it, if my strength will permit, before the time when, in the regular course, the court will be prepared to pass upon it.

As we read the prevailing opinion, it seems to us to be based upon a misapprehension of what the contract required of the plaintiff in the way of a guarantee. The meat of that decision lies in the following language:

"It is contended that by those portions of the instructions the court erroneously shifted to the plaintiff the burden of proof which rested upon the defendant to prove the plaintiff's inability to perform. But the burden of proof was upon the plaintiff to show his damages. There could be no damage to him from the breach of the contract unless he was ready, willing and able to perform upon his part. He recognized that fact in drawing his complaint, wherein he alleged his ability and readiness to perform. He wholly failed to prove a tender of a guarantee within the terms of the contract, or to prove his ability to furnish such a guarantee. We find no error, therefore, in the instructions."

It plainly appears from the foregoing that the court had in mind, without giving it form, some definition of "a guarantee within the terms of the contract" which it was necessary for the plaintiff "to prove his ability to furnish."

In the beginning of the opinion it is said:

"the plaintiff's own testimeny showed conclusively not only that he wholly failed to furnish or offer to furnish the guaranty, but that he did not regard the contract as requiring him to furnish a guaranty in the sum of \$525,000, which sum he admitted to be 'the amount of the hire money for the two round trips.' The evidence showed that what the plaintiff was proposing to do in compliance with his contract to furnish a satisfactory guaranty was to obtain from prospective shippers contracts," etc.

The foregoing assumes that the required guaranty "within the terms of the contract" was one "in the sum of \$525,000"—that is, an absolute undertaking in that sum to secure the hire money for the two round trips; and that the contracts for the carriage of the cargoes together with a month's money placed in escrow in the International Banking Corporation and a bond of \$120,000 (Rec. pp. 41, 42) could not possibly be "a guaranty within the terms of the contract."

In the first place, the statement in the opinion that the

"evidence showed that what the plaintiff was proposing to do in compliance with his contract to furnish a satisfactory guaranty, was to obtain from prospective shippers contracts for shipment of freight on the steamer and by means of such contracts to obtain for the defendant an indemnity bond from a guaranty company in the sum of \$120,000 and to raise cash sufficient to place in escrow for the defendant \$115,000, a sum equal to one month's charter hire",

is a plain misunderstanding of the testimony. What Captain Helm said was (Rec. pp. 41, 42):

"The guaranty that previous to March 2nd I had told Captain Lapham I would give, consisted of a month's money placed in escrow in the International Banking Corporation, a bond for \$120,000, and these contracts. The total of the three different constituent parts was the guaranty; one was a bond."

It is plain that the court was misled into adopting the construction placed upon this language by the appellee in his brief, which does not find warrant in the language of the record. The *contracts* were distinctly tendered as a part of the security, and who shall say that such a guaranty would not be "satisfactory" "for the amount of hire money"?

The terms of the contract on which this action is based, did not * * require "him to furnish a guaranty in the sum of \$525,000", but required him to furnish "a satisfactory guaranty to the owners for the amount of hire money", etc.

Now, as above shown, the plaintiff did tender some guaranty to the defendant. The defendant did not object that it was unsatisfactory either in the nature of the guaranty or in the amount, but held out for a guaranty outside of the contract, which the court instructed the jury was "more burdensome than the guaranty provided for in the original contract of the parties", and one which the plaintiff was under no obligation to execute.

The question is thus left open in the case as to whether or no the guaranty offered by the plaintiff would have been a "satisfactory guaranty to the owners for the amount of hire money." We lay stress upon the fact that the contract did not require a guaranty "in the sum of \$525,000", the amount of the hire money, but required a guaranty "for" that amount satisfactory to the owners. So long as it was "satisfactory" to the owners, the amount was immaterial. But they did not reject it as not a "satisfactory guaranty * * *

for the amount of the hire money", but they were asking for a guaranty outside of and beyond the terms of the contract.

It is not for the court to say that what was offered them would not have been "satisfactory" "within the terms of the contract." So far as the record stands, that was "a tender of a guaranty within the terms of the contract."

Another, and perhaps more convincing suggestion that the prevailing opinion is wrong, lies in the fact that the court in its opinion concerned itself alone with the instructions, and paid no attention to the assignments of error on the question of admission and rejection of evidence.

Assuming, for the sake of argument, that the court's instruction as to ability was right, the finding of the jury is based on the conclusions to be drawn from the law as applied to the facts. The jury must, according to the instruction of the court, find the fact of ability to perform.

"If he has failed to establish that fact to your satisfaction by a preponderance of the testimony, he cannot recover, because in contemplation of law he has suffered no injury." (Rec. p. 105.)

Now, the finding of "that fact" rests upon the testimony admitted, and if the testimony touching "that fact" is erroneously admitted, the finding of the jury thereon is vitiated. It is not in the province of the appellate court to make a finding of fact, as this court does (upon what is under the rules of the court necessarily a partial record of the testimony), that

"He wholly failed to prove a tender of a guaranty within the terms of the contract, or to prove his ability to furnish such a guaranty."

That was a question entirely for the jury upon the whole record which was before it, and not before this court. Only a part of that record is before this court. This is in accordance with the rules which require that only enough of the testimony to illustrate the errors assigned, be included in the record.

Now, it is true the jury is presumed to have found in accordance with the instruction of the court that plaintiff did not prove ability to perform. But if that finding is based upon testimony erroneously admitted, it cannot be accepted as conclusive. It does not, however, rest with the appellate court to make a finding upon the subject. The cause should be resubmitted to the jury upon a trial where the erroneous testimony is excluded.

As suggested in our opening to our reply brief,

"Defendant's main argument is an attempt to convince this court that, as a matter of fact, plaintiff did not have the ability to perform",

and it seems that he has succeeded in doing what we then suggested he was attempting to do, namely, sidetrack the question as to whether or no the rulings of the court on the admissions or rejections of testimony was error. His argument, as we then said, was

"addressed to a discussion, not of the exceptions which are the subject of the appeal, but was an attempt to treat this appeal as a trial de novo,"

and if we may be pardoned the suggestion, we think that this court has fallen in with that idea.

We said in our reply brief (p. 22) under the heading "Ability to Perform as a Matter of Fact", that

"we must assume that the jury found, as a matter of fact, want of ability to perform, and because this finding of fact followed from the instructions AND RULINGS complained of, it points the injury which is the basis of this appeal".

In the same connection we further said:

"It does not, therefore, help in the determination of this appeal, to discuss this question of fact so persistently as defendant does, and under these circumstances we can conceive of no purpose in so doing, other than an attempt to create an unconscious mental bias. This situation, we feel is always sufficiently corrected by calling attention thereto."

It now appears that we fell into error in trusting that counsel's statements of fact could thus be corrected by a mere suggestion. The entire opinion rests upon an assumption of fact that the plaintiff's testimony showed conclusively that he failed to furnish or offer the guaranty, and that

"he wholly failed to prove a tender of a guaranty within the terms of the contract, or to prove his ability to furnish such a guaranty."

The record, however, is replete with assignments of error regarding the admission and rejection of evidence upon this subject, and the question before this court was not a question as to whether or no the plaintiff proved one thing or another, but a question of law as to whether or no the assignments of error are well taken.

Now, upon this question of ability, the jury must have been led to find want of ability upon evidence which was admitted, and which is plainly inadmissible. We refer as a glaring instance, to testimony admitted over our objection, of a proposed charter with Hind, Rolph & Co. between the dates of March 31st and April 4th, which testimony followed an offer

"to prove by this witness that on March 31, 1916, a refusal was given to Captain Helm by Hind, Rolph & Company, a steamship company here, giving him three days to obtain from the International Banking Corporation a guaranty in the amount of \$55,000; that option was from March 31 to April 4; that Captain Helm was unable to produce to the International Banking Corporation any security or any guaranty during that time, and that thereafter it was extended to April 6th and he was unable to produce any security of any character during that time, and the option was then terminated." (Rec. pp. 56, 67, 74.)

As said in our original brief (pp. 38, 39),

"Inasmuch as the contract in suit was entered into on February 28th, and was cancelled by defendant on March 3rd, any testimony concerning the ability of the plaintiff to obtain a guaranty in another transaction after the latter date, to-wit: between March 31st and April 6th, is necessarily immaterial, and it was error on the part of the court to admit the same."

We think this proposition is beyond a doubt, and yet the court took no notice of it.

There are other objections to testimony of a similar nature in the record, and referred to in our opening brief, of which no notice was taken. I cannot at this time reproduce them in detail on account of my physical condition and the short time allowed within which to put this petition into print. However, if opportunity presents, I will, as already suggested, supplement the petition. If I fail in doing so, the record is exceedingly short, and it may not be asking too much of the court to turn to the record for first-hand information upon the subject.

Dated, San Francisco, April 15, 1922.

Respectfully submitted,

Nathan H. Frank, Attorney for Plaintiff in Error and Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for plaintiff in error and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, April 15, 1922.

NATHAN H. FRANK,

Of Counsel for Plaintiff in Error

and Petitioner.



IN THE

United States Circuit Court of Appeals For the Ninth Circuit

JAMES C. DAVIS, as Agent of the Government of the United States of America (Substituted for John Barton Payne, Agent,

Plaintiff in Error.

F 13. 12.5

VS.

HARRIETT O. GOOD, as heir at law of HENRY M. GOOD, deceased, and HENRY MAX GOOD, a minor, by Harriett O. Good, his mother and legal representative, Defendants in Error.

Transcript of the Record

Wit of Enor to

Upon Appeal from the United States District Court for the District of Idaho, Southern Division.



IN THE

United States Circuit Court of Appeals For the Ninth Circuit

JAMES C. DAVIS, as Agent of the Government of the United States of America (Substituted for John Barton Payne, Agent,

Plaintiff in Error.

VS.

HARRIETT O. GOOD, as heir at law of HENRY M. GOOD, deceased, and HENRY MAX GOOD, a minor, by Harriett O. Good, his mother and legal representative, Defendants in Error.

Transcript of the Record

Upon Appeal from the United States District Court for the District of Idaho, Southern Division.

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD:

GEORGE H. SMITH, Salt Lake City, Utah.

JOHN O. MORAN, Pocatello, Idaho.

H. B. THOMPSON,
Pocatello, Idaho.

Attorneys for Plaintiff in Error.

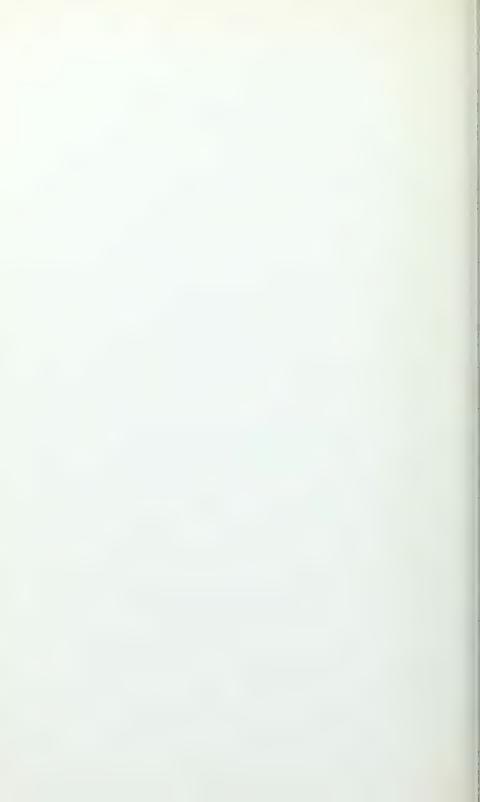
WALTERS, HODGIN & BAILEY, Twin Falls, Idaho.

C. C. CAVANAH,
Boise, Idaho.

Attorneys for Defendants in Error.

INDEX

	age
Amended Complaint	17
Answer to Amended Complaint	22
Assignment of Errors	88
Bill of Exceptions	27
Citation	92
Clerk's Certificate	96
Complaint	9
Demurrer	13
Instructions to Jury	75
Judgment on Verdict	26
Order allowing Writ of Error	87
Order Sustaining Demurrer	16
Order Settling Bill of Exceptions	73
Order extending time for Settlement of Bill of Exceptions	73
Order substituting James C. Davis as Agent of the Government	
Government	1.1
Petition for Writ of Error	85
Praecipe	94
Praecipe of Appellees for Additional parts of record	95
Return to Writ of Error	96
Stipulation	. 75
Verdict	26
Writ of Error	. 90



INDEX TO BILL OF EXCEPTIONS. Witnesses on Part of Plaintiff.

	Page
COFFELT, OWEN—	
Direct	
FLETCHER, A. L.—	
Direct	55
FULLER, J. L.—	
Direct	30
FULLBRIGHT, HENRY—	
Direct	54
GOOD, HARRIETT O.—	
Direct	28
GRIFFITH, E. L.—	
Direct	31
LANE—J. H.—	
Direct	53
MATTSON, A. B.—	
Direct	30
RICKS, M. A.—	
Direct	41
SULLIVAN, DAN—	
Direct	49
SMITH, B. F.—	
Direct	50
SCHWANER, GEORGE	
Direct	53
WYANT, LILLIE DALE—	
Direct	29



In the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Elmore.

HARRIETT O. GOOD, as heir at law of Henry M. Good, deceased, and for and on behalf of Henry Max Good, a minor,

Plaintiff,

VS.

WALKER D. HINES, agent, and the OREGON SHORT LINE, RAILROAD COMPANY, a corporation, and E. L. GRIFFITH, Defendants.

COMPLAINT.

Comes now the Plaintiff, and for cause of action, alleges:

- 1. That the plaintiff Harriet O. Good is the widow and heir at law of Henry M. Good, deceased; that Henry Max Good is the minor son of the plaintiff, Harriet O. Good, and Henry M. Good, deceased; said Henry Max Good, being of the age of four years, and is one of the heirs at law of Henry M. Good, deceased. That plaintiff, Harriet O. Good, and Henry Max Good are the only heirs of Henry M. Good, deceased.
- 2. That the defendant, Walker D. Hines, is the agent appointed by the President under and by virtue of Section 206 "A" of an Act of Congress ap-

proved February 28th, 1920, entitled "An Act" to provide for the termination of Federal control of railroads and systems of transportation. That under and by virtue of the terms of said Act of Congress,—actions at law, suits in equity, and proceedings in admiralty, based on causes of action arising out of possession, use, or operation by the President of the railroad or system of transportation of any carrier, may be brought against said agent.

3. That the defendant, Oregon Short Line Railroad Company, is a corporation organized and existing under and by virtue of the laws of the State of Utah; said railroad company has complied with the laws of the State of Idaho so as to entitle it to do business in said state.

Said defendant corporation is, and was, on the 11th day of January, 1920, engaged in the business of operating a railroad line through and across the State of Idaho; said railroad line extending from Granger, in the State of Wyoming, through and across the State of Idaho, to Huntington, in the State of Oregon.

That among others, said railroad line passes through the towns of Glenns Ferry, Hammett, Medbury, and Mountain Home in said State of Idaho; that among other things, the business of said corporation consists in the transportation of freight and passengers over its said line. That for some

time prior thereto, and at the time of the accident hereinafter described, and until the first day of March, 1920, the defendant corporation was under Federal control, and was being operated by Walker D. Hines as Director General of Railroads, of the United States.

- 4. That the said defendant E. L. Griffith, at the time of the accident hereinafter described, was and now is, a citizen and resident of the State of Idaho, residing near the City of Caldwell, in the State of Idaho, and at the time of the accident hereinafter described was an employee of the defendant corporation, to-wit: Conductor,—on freight train extra No. 2010, west.
- 5. That on or about the 11th day of January, 1920, Henry M. Good, now deceased, was a lawful passenger on one of defendant's west bound trains, being Freight Train Extra No. 2010 West, running over and along the aforesaid line of railroad; that deceased was at the time, shipping two car loads of cattle over said line of railroad; that said two car loads of cattle were in said train and the deceased was riding in the caboose, which was attached to the rear of said train.

That while said train was being run over and along said line, a short distance west of Medbury Station, and while the deceased was a lawful passenger thereon,—said freight train extra No. 2010 west, became stalled, on what is commonly known

as Medbury Hill; that while said train was so stalled the defendants carelessly and negligently, caused said train to be cut into and carelessly and negligently, left, or caused to be left standing, on the track, a large number,—to-wit: about twenty-two (22) cars of said train; the defendants carelessly and negligently failed to set, or cause to be set, the hand brakes on the cars so left standing on the track.

That the cars so carelessly and negligently left standing upon which the defendants so carelessly and negligently failed to set or cause to be set, the hand brakes, ran back down the track and with great force, crashed into defendant's west bound passenger train, number seventeen (17), which was standing on the defendant's tracks near Medbury station,—completely wrecking and demolishing the caboose and several of the cars of said Extra Freight Train No. 2010.

That at the time of the collision, the deceased was a lawful passenger on said train number 2010, and was riding in the caboose, and by reason of aforesaid carelessness and negligence of the defendants, the deceased was instantly killed,—all of which took place in the County of Elmore, State of Idaho.

6. That the said Henry M. Good, deceased, was at the time of his death, thirty-eight (38) years of age, in good health, in possession of all his faculties,

and capable of earning four thousand dollars (\$4,000.00) per year.

That at the time of his death, deceased was the *sole* support of the plaintiffs herein.

7. That by reason of the carelessness and negligence of the defendants in carelessly and negligently causing the death of said Henry M. Good, these plaintiffs have been damaged in the sum of Seventy-five Thousand Dollars (\$75,000.00).

WHEREFORE, Plaintiff prays judgment of this Court against the defendants in the sum of SEV-ENTY-FIVE THOUSAND DOLLARS (\$75,-000.00), and for their costs and disbursements herein.

WALTERS, HODGIN & BAILEY,

Attorneys for Plaintiffs. Residence, Twin Falls, Idaho.

Certified by F. M. Hobbs, Clerk of State Court, and Filed Aug. 2, 1920.

W. D. McREYNOLDS, Clerk. By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

DEMURRER.

Come now the defendants, Oregon Short Line Railroad Company and Walker D. Hines, Agent, and each for itself and himself separately and not jointly, demurs to the complaint filed herein on the following grounds:

I.

That said complaint does not state facts sufficient to constitute a cause of action in favor of the plaintiff, for and on behalf of Henry Max Good, a minor, and against these defendants, either individually or jointly with the other defendants in said action.

II.

That there is a misjoinder of parties defendant in the joining of Walker D. Hines, Agent, and the Oregon Short Line Railroad Company, in that said complaint does not state a joint cause of action against both of said defendants, and under the laws of the United States and executive and other orders made for and on behalf of the United States pursuant thereto, neither said Walker D. Hines or any other person as Agent of the United States is subject to suit on account of injuries sustained by any person on the lines of railroad of the said Oregon Short Line Railroad Company in those cases where, notwithstanding Federal control, said corporation may be sued, and if Walker D. Hines, Agent, was in the operation, management and control of said line of railroad, then the United States and its said Agent are solely liable, and the defendant, Oregon Short Line Railroad Company, is not liable therefor; that there is a misjoinder of parties defendant

in that said complaint does not state a cause of action in favor of the plaintiff, as heir at law of Henry M. Good, deceased, and for and on behalf of Henry Max Good, and against the defendant E. L. Griffith, either individually or jointly with the other defendants.

III.

That said complaint is ambiguous, unintelligible or uncertain, in that in paragraph V thereof the acts complained of as constituting negligence are alleged to have been caused by the "defendants," and it can not be ascertained therefrom or elsewhere in said complaint upon what theory plaintiff claims both the defendant, Walker D. Hines, Agent, and the defendant, Oregon Short Line Railroad Company were engaged in the operation of said line of railroad, and the acts of commission and omission complained of, or upon what theory plaintiff joins both of said parties as defendants herein, or which of said defendants plaintiff claims, or will claim upon the trial, was operating said railroad at said time and place, the plaintiff having previously alleged in paragraph III of said complaint that the defendant corporation was operating said line of railroad at the time and place therein alleged, and if that be the fact and the Director General of Railroads was not operating said line of railroad at that time (and it is nowhere previously alleged that he was) said paragraph III and paragraph V of said complaint are incapable of reconciliation because of said ambiguity or uncertainty.

WHEREFORE, said defendants pray to be hence dismissed with their just costs and disbursements incurred herein.

> GEORGE H. SMITH, H. B| THOMPSON, JNO. O. MORAN, Attorneys for Defendants.

Residence and postoffice address of H. B. Thompson and Jno O. Moran, Pocatello, Idaho. Certified by F. M. Hobbs, Clerk of State Court, and

Filed, Aug. 2, 1920, W. D. McREYNOLDS, Clerk.

By Pearl E. Zanger, Deputy.

ORDER SUSTAINING DEMURRER. (MINUTE ENTRY)

At a stated term of the District Court of the United States for the District of Idaho, held at Boise, Idaho, on Monday, Sept. 13, 1920, the following proceedings, among others, were had to-wit:

Present, Hon. F. S. Dietrich, Judge.

Harriett O. Good, et al.,)	
VS.)	Civil No. 847
Walker D. Hines, et al.,)	

The demurrer to the complaint was argued before the Court by counsel for the respective parties, whereupon, the Court announced his decision, sustaining the demurrer, and allowing the plaintiff sixty days in which to amend and take substitution of party agent.

(Title of Court and Cause.)

AMENDED COMPLAINT.

Come now the Plaintiffs, and for cause of action, allege, as follows:

- 1. That the plaintiff, Harriett O. Good, is the widow and heir at law of Henry M. Good, deceased; that Henry Max Good is the minor son of the plaintiff, Harriett O. Good, and Henry M. Good, deceased; said Henry Max Good, being of the age of four years, and is one of the heirs at law of Henry M. Good, deceased. That plaintiff, Harriett O. Good. and Henry Max Good, are the only heirs of Henry M. Good, deceased.
- 2. That the plaintiff Harriett O. Good is the duly appointed, qualified, and acting guardian of the said Henry Hax Good, and prosecutes this action on her own account as heir at law of said deceased, and for and on behalf of Henry Max Good, as the legal representative of said minor.
- 3. That the defendant, John Barton Payne, is the agent, appointed by the President, under and by virtue of Section 206-A, of an Act of Congress,

approved February 28th, 1920, entitled, "An Act," to provide for the termination of Federal Control of railroads and systems of transportation. That under and by virtue of the terms of said Act of Congress, actions at law, suits in equity, and proceedings in admiralty, based on causes of action arising out of possession, use, or operation, by the President of the Railroad or system of transportation, of any carrier, may be brought against said agent and this action is brought against the defendant in his capacity as agent of the Government of the United States of America, and not otherwise.

4. That long prior to the accident hereinafter described, the President, acting under authority of an Act of Congress, took over the control and operation of the railroad systems in the United States, including the Oregon Short Line Railroad Company's system, and duly appointed a Director General of Railroads, whose duty it was, to take charge of, control, and operate said railroads. That said Director General so appointed for the purpose of controlling and operating said systems of transportation, including the system of the Oregon Short Line Railroad Company, appointed certain agents, servants, and employees.

That prior to the commencement of this action, to-wit, on the first day of March, 1920, the President, acting under authority of an Act of Congress, approved February 28th, 1920, returned the rail-

road systems, including the system of the Oregon Short Line Railroad Company, to their respective owners, and ceased to control and operate said Oregon Short Line Railroad system from and after said first day of March, 1920.

5. That on the 11th day of January, 1920, and for some time prior thereto, Walker D. Hines, was the duly appointed, qualified and acting, Director General of Railroads, for the Government of the United States of America, and as such Director General, among other things, was engaged in the business of operating the railroad line, commonly known as the "Oregon Short Line,"—which said line runs through and across the State of Idaho.

That among other towns, said railroad line passes through the towns of Glenns Ferry, Hammett, Medbury and Mountain Home, in said State of Idaho.

6. That on or about the 11th day of January, 1920, Henry M. Good, now deceased, was a lawful passenger on a train being operated by the agents, servants, and employees of the said Walker D. Hines, Director General of Railroads, being freight train extra, No. 2010 West, running over and along the aforesaid line of railroad.

That the deceased was at the time, shipping two carloads of cattle over said line of railroad; that said two carloads of cattle were in said train, and the deceased was riding in the caboose, which was

attached to the rear of said train. That while said train was by the agents, servants, and employees of the said Director General of Railroads, being run over and along said line a short distance west of Medbury Station, and while the deceased was a lawful passenger thereon, said freight train extra, No. 2010 west, became stalled on what is commonly known as "Medbury Hill."

That while said train was so stalled, the agents, servants, and employees of the said Director General, having charge of said train, or someone or all of them, carelessly and negligently caused said train to be cut in two, and the said agents, servants, and employees of the said Director General, having charge of said train, or some one, or all of them, carelessly and negligently left or caused to left, standing on the track, a large number—towit, about twenty-two (22) cars of said train; that the said agents and servants, and employees, or some one or all of them, carelessly and negligently, failed to set, or cause to be set, the hand brakes on the cars so left standing on the track.

That the cars so carelessly and negligently left standing upon which the said agents, servants, and employees, or some one or all of them, so carelessly and negligently failed to set or cause to be set the hand brakes, ran back down the track, and with great force, crashed into west bound passenger train No. 17, which was standing on the tracks near Medbury Station,—completely wrecking and demolishing the caboose and several of the cars of said extra freight train No. 2010 west.

That at the time of the collision, the deceased was a lawful passenger on said train No. 2010 west, and was riding in the caboose,—and by reason of the aforesaid carelessness and negligence of the agents, servants, employees, of the said Director General, or someone or all of them,—the deceased was instantly killed,—all of which took place, in the County of Elmore, State of Idaho.

- 7. That the said Henry M. Good, was at the time of his death, thirty-eight (38) years of age, —in good health,—in possession of all his faculties, and capable of earning four thousand dollars per year. That at the time of his death, deceased was the sole support of the plaintiffs herein.
- 8. That by reason of the carelessness and negligence of the agents, servants, and employees of the said Director General, or some one or all of them, in carelessly and negligently causing the death of the said Henry M. Good, these plaintiffs have been damaged in the sum of SEVENTY-FIVE THOUSAND DOLLARS,—(\$75,000.00).

WHEREFORE, Plaintiffs pray judgment of this Court, against the defendant, as the agent of the Government of the United States of America, in the sum of SEVENTY-FIVE THOUSAND DOL-

LARS, (\$75,000.00), and for their costs and disbursements herein.

WALTERS, HODGIN & BAILEY, Attorneys for Plaintiffs.

Residing at Twin Falls, Idaho.

Endorsed: Filed Nov. 12, 1920.

W. D. McREYNOLDS, Clerk.

By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

ANSWER TO AMENDED COMPLAINT.

Comes now John Barton Payne, designated herein as agent of the Government of the United States of America, and for his answer to the amended complaint filed in the above entitled action admits, denies and alleges as follows:

I.

Admits that the plaintiff Harriett O. Good, is the widow of Henry M. Good, deceased, and that Henry Max Good is the minor son of the plaintiff Harriett O. Good and Henry M. Good, deceased, but defendant alleges he has not sufficient knowledge or information to form a belief as to whether the plaintiff Harriett O. Good, or said minor son Henry Max Good are heirs at law, or the only heirs at law of Henry M. Good, deceased, and on that ground denies such allegations.

II.

Alleges he has not sufficient knowledge or information to form a belief as to whether the plaintiff Harriett O. Good is the duly appointed, qualified or acting guardian of the said Henry Max Good, or prosecutes this action on her own account as heir at law of said deceased, or for or on behalf of Henry Max Good as the legal representative of said minor, and on that ground denies such allegations.

III.

Admits the allegations of paragraph 3 of said amended complaint.

IV.

Admits the allegations of paragraph 4 of said amended complaint.

V.

Admits the allegations or paragraph 5 of said amended complaint.

VI.

Answering paragraph 6 of said amended complaint defendant admits the allegations of the first and second subdivisions, excepting that defendant denies that said Henry M. Good, deceased, was a lawful passenger on said train according to the ordinary and usual meaning and acceptation of such term, and alleges he was a drover passenger; and denies that said train became stalled on what is commonly called Medbury Hill, although admitting that said train stopped at such point at the time alleged.

Further answering said paragraph 6, and the subdivisions thereof, defendant denies that while said train was stalled as alleged, or otherwise or at all, the agents, servants or employees or defendant having charge of said train, or someone or all or any or either of them, carelessly or negligently caused said train to be cut in two, or carelessly or negligently left or caused to be left standing on the track a large number or twenty-two, or any other number of cars of said train, or carelessly or negligently failed to set, or cause to be set, the hand brakes on such cars left standing as alleged; denies that any car or cars carelessly or negligently left standing, as alleged, or upon which said agents, servants or employees of defendant, or someone or all or any or either thereof, had carelessly or negligently failed to set or cause to be set the hand brakes, ran back down the track or with great force crashed into westbound passenger train No. 17, standing on the track near Medbury station, or completely wrecked or demolished the caboose or several of the cars of said freight train, although defendant admits that a certain number of cars of said freight train ran back down the track and crashed into said westbound passenger train No. 17, which was then moving backward in an effore to avoid a collision, and completely wrecked and demolished the caboose and several cars of said extra freight train, and instantly killed said deceased Henry M.

Good; admits that said deceased, at the time of said collision, was riding in the caboose as a drover passenger, but denies that he was a lawful passenger in any other sense, or that by reason of any carelessness or negligence of the agents, servants or employees of defendant, or someone or all or either thereof, as alleged anywhere in said complaint, said deceased was instantly killed.

VII.

Alleges that defendant has not sufficient knowledge or information to form a belief as to whether, at the time of his death, said Henry M. Good was thirty-eighty ears of age, or in good health, or in possession of all of his faculties, or capable of earning Four Thousand (\$4,000.00) Dollars per year, or was the sole support of plaintiffs herein, or either thereof, and on that ground denies such allegations.

VIII.

Denies that by reason of any carelessness or negligence of the agents, servants or employees of defendant, or someone or all or any or either of them, as alleged anywhere in said complaint, the death of said Henry M. Good was caused, or plaintiffs, or either thereof, have been damaged in the sum of Seventy-five Thousand (\$75,000.00) Dollars, or any other sum.

WHEREFORE, having fully answered the amended complaint herein, defendant prays to be

hence dismissed with his just costs and disbursements herein incurred.

(Duly verified):

Endorsed: Filed Nov. 16, 1920.

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

VERDICT.

We, the jury in the above entitled cause, find for the plaintiffs and against the defendant, and assess the plaintiff's damages at \$21,250.00.

T. B. MARTIN,

Foreman.

Endorsed: Filed Feb. 25, 1921.

W. D. McREYNOLDS, Clerk U.S. Dist. Court.

(Title of Court and Cause.)

JUDGMENT ON VERDICT.

This cause came on regularly for trial. The parties appeared by their attorneys, Messrs. Walters & Hodgins and C. C. Cavanah, counsel for plaintiffs, and Geo. H. Smith, H. B. Thompson and Jno. O. Moran, esquires, for defendants. A jury of twelve persons was regularly impaneled and sworn to try said action. Witnesses on the part of the plaintiffs and defendants were sworn and examined. After hearing the evidence, the arguments of counsel and instructions of the Court, the jury retired to consider of their verdict, and sub-

sequently returned into Court with the verdict, signed by the Foreman, and being called, answered to their names and say: "We, the jury in the above entitled cause, find for the plaintiffs, and against the defendant, and assess the plaintiffs' damages at \$21,250.00.

T. B. MARTIN, Foreman."

WHEREFORE, by virtue of the law, and by reason of the premises aforesaid, it is ORDERED AND ADJUDGED that said plaintiffs have and recover from said defendant the sum of Twentyone Thousand Two Hundred Fifty Dollars (\$21,-250.00), with interest thereon at seven per cent (7%) per annum from the date hereof until paid, together with plaintiffs' costs and disbursements incurred in this action, amounting to the sum of \$479.43, retaxed by the Court at \$451.73.

Dated this 26th day of February, 1921.

W. D. McREYNOLDS,

Clerk

Endorsed: Filed Feb. 26, 1921.

W. D. McREYNOLDS, Clerk U. S. District Court.

(Title of Court and Cause.)

BILL OF EXCEPTIONS.

BE IT REMEMBERED that the trial of the above entitled cause came on the 24th day of February, 1921, at a stated term of the above entitled

Court begun and holding at Boise, Idaho, in said District, the Honorable F. S. Dietrich, District Judge, presiding, with a jury, Messrs. Walters & Hodgin and C. C. Cavanah, Esq., appearing as counsel for the plaintiff, and H. B. Thompson, Esq. appearing for the defendant, whereupon the following proceedings were had:

HARIETT O. GOOD, called as a witness on her own behalf, being first duly sworn, testified as follows:

I live on a farm four and a half miles north of Richfield, Idaho, and am the widow of Henry M. Good, now deceased. I have one child, a boy named Henry Max Good, five years old last November. I was married to Henry M. Good in Nelson, Nebraska, August 3, 1907, at which time Mr. Good was engaged in mining and so continued for between three and four years thereafter. Following our marriage we resided at Los Angeles, California and Reno, Nevada. About three years after our marriage Mr. Good became a traveling salesman and continued in such occupation for five or six years. After that we bought a ranch, consisting of eighty acres of unimproved land, at Richfield, and went there in 1916. In addition to that Mr. Good rented some adjoining land, which he also cultivated. He cleared the eighty acres of sage brush land which we purchased, and plowed and planted it in crop, and built a home and barn and

fences and all those things. Sometimes he bought and sold some livestock the last year of his lifetime. We were married twelve and a half years before his death, which occurred in January, 1920, at which time he was thirty-seven years old, and would have been thirty-eight years old April 29, 1920. During the time that he was a traveling salesman for Blake & McFall Company he received \$225.00 a month, and the last year he made a bonus of about \$400.00. Since my husband's death I have lived at Richfield, where I have taught school. I last saw my husband on the morning of Saturday, January 10, 1920, when he left Richfield, Idaho, with a carload of cattle for Portland, Oregon. The next time I saw him was the following Tuesday at Richfield, Idaho, at which time he was dead.

The witness was not present at the time of the train collision, in which Mr. Good came to his death, and did not undertake to testify as to any of its circumstances.

LILLIE DALE WYANT, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

I am the mother of Mrs. Good, the plaintiff in this action. I knew Henry M. Good a few years prior to his marriage and ever since, and lived with Mr. and Mrs. Good off and on for between seven and eight years. His conduct toward his wife and

son was always kind and good. He was industrious and his health was always very good. At the time of Mr. Good's death he owned eighty acres of irrigated land at Richfield, Idaho, situated about four and a half miles from the railroad station and stocked with cattle, hogs, and horses.

A. B. MATTSON, a witness produced on behalf of the plaintiff, being first duly sworn, testified as follows:

I am employed by the Oregon Short Line Railroad Company, and during the month of January, 1920, was employed as Station Agent on that line of railroad at Richfield, Idaho. Knew Henry M. Good in his lifetime, and on January 10, 1920, made a written contract with him for the transportation of carload of livestock from Richfield, Idaho, to Portland, Oregon, which is marked Plaintiff's Exhibit No. 1, and which bears the signature of Henry M. Good and also my name, which was affixed to the contract by the cashier at Richfield who was authorized to sign it. Didn't see Mr. Good get on the train in which his livestock left Richfield, but suppose he did. The shipment left Richfield on the afternoon of January 10, 1920.

J. L. FULLER, produced as a witness on behalf of the plaintiff, being first duly sworn, testified that he was Probate Judge for Lincoln County, Idaho, and produced a certified copy of the order appointing Mrs. Good guardian for Henry

Max Good, her minor son, and Letters of Guardianship.

E. L. GRIFFITH, produced as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

I have lived at Ontario, Oregon, for about four years, engaged in farming. In January, 1920, I was employed as conductor on the Oregon Short Line Railroad, and on January 10, 1920, was conductor on Extra freight train 2010 West, which I took charge of at Glenns Ferry at about ten o'clock P. M. The train consisted of fifty-five cars, one of which cars was loaded with cattle. There were three engines on the train; one road engine and two helpers to assist in hauling the train up Medbury hill. The train stopped on the hill and I got out of the caboose and went forward alongside of the train toward the head end, so that that part of the train might be taken to Chalk, which was the next siding. Cut the train in two, leaving about thirty-two cars standing on the main track. Did not set the hand brakes. Rode on the helper engine with the forward portion of the train to Chalk, and then came back to where the rear portion of the train had been left, but on arriving at that point the rear portion of the train which we had left standing there had gone. Thereupon I proceeded down the track ahead of the engine to a point where we found the wreck, where the hind end had collided with the helper engine of train No. 17. Do not know the per cent of the grade, and do not know whether any hand brakes were set on the cars that were left standing on the hill. The weather was rather cold and clear, and the rails frosty. It was about a mile and a half from where the cars were left standing to the point of the wreck, it was down grade all the way. There were two men in the caboose who were accompanying livestock, one of whom was H. M. Good. I was employed as brakeman from 1911 to 1917. Had broke out of Glenns Ferry very little.

Question by plaintiff's counsel: I will ask you, Mr. Griffith, whether or not it would be necessary to set the hand brakes on the cars in order to hold them on the grade?

Mr. Thompson: I object that the witness hasn't qualified.

After some further examination the Court said: I am very clear, gentlemen, that this is a proper question. If it was shown that this witness had any particular experience in handling trains on this hill—You haven't shown what the custom was or is, perhaps was at the time. I think I shall have to sustain the objection in the present form, to the question in the present form.

Mr. Hodgin: Mr. Griffith, would those 32 cars have stood on that grade there without any brakes having been set?

Mr. Thompson: That is objected to upon the ground that the question is incompetent, and upon the ground that this witness is not qualified.

The Court: I shall sustain the objection.

Mr. Hodgin: You may cross-examine.

Mr. Thompson: There will be no cross examination.

Mr. Hodgin: You may state if you know what these men were doing in the caboose when you left them?

(a) Supposingly they were asleep. One was lying on the cushion and the other was laying on the stretcher on the floor—I did not disturb or call them or tell them the train was stopped.

OWEN COFFELT, produced as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Am 26 years old and have lived in Glenns Ferry, Idaho, all my life. Was employed on the Oregon Short Line Railroad as a brakeman during the month of January, 1920, and on the 10th day of that month was called for ten o'clock P. M. to go out on freight train Extra 2010 West, and went west on that train as rear brakeman. The train stopped near a siding called Chalk, which is about half way up Medbury hill, and I went back to flag train No. 17. After I got back down the track about half a mile the hind portion of the freight train passed me and backed on down into the helper en-

gine on passenger train No. 17. There were two men asleep in the caboose when I left, which was almost immediately after the train stopped. I did not set any hand brakes on the train. I do not know whether anyone else did. Do not know the per cent of grade. There were two helper engines on west-bound train 2010 and one road engine.

Mr. Hodgin: You may state whether or not it was necessary to set brakes on those 32 cars in order to hold them on the grade.

Mr. Thompson: I object to that question as incompetent, and outside the issues, and that this witness has not qualified to answer the question, no proper foundation laid.

The Court: Sustained.

Q. What was the condition of the grade at the point where the train stopped, Mr. Coffelt, with reference to being uniform or steep or otherwise?

A. It was on a curve. I don't know what the per cent of the grade was, I couldn't say, but it was up hill.

Q. Mr. Coffelt, you may state, if you know, whether or not it was customary when freight trains stopped on Medbury hill at Chalk or at the point where westbound 2010 stopped that morning, to apply the brakes.

Mr. Thompson: I object to that upon the ground that it assumes that the witness knows, and upon

the ground that it is not limited to the point in question involved in this case.

The Court: Do you know what the custom was when trains stopped at that particular point, that is, at Chalk siding, where this train stopped on that occasion? Was there any custom? If so, you may state what it was.

A. There is a custom. It all depends upon what—

The Court: As to the use of the brakes?

Mr. Thompson: May I inquire first of the witness?

The Court: Yes. Was there a custom, to your knowledge?

A. There was.

The Court: Were cars sometimes set out there, cars detached from the train and set out at that point?

A. At Chalk I suppose there is.

The Court: I am asking you what you know about it. Were you ever on a train at any other time when it stopped at this point and the engine was cut off?

A. Yes, once.

Mr. Thompson: Now I submit that this witness cannot establish a custom by a single experience, and for that reason I object that he is not qualified.

Mr. Hodgin: I think the weight is for the jury. The Court: No. Of course one instance wouldn't

establish custom, but it might be that he would know something more about it than this particular incident. I really don't like to examine this witness myself, gentlemen. I prefer to have you do it,—to see what he knows about it by way of observation or experience there.

Continuing the witness testified:

I would judge that the grade is about the steepest, close to it, but couldn't say for sure. There is no grade between Glenns Ferry and Huntington that is as steep as Medbury hill. It always requires helpers to draw a train up the grade. The helpers cut off and turn back at reverse, which is at the top of the hill and approximately eight and a half miles from Medbury station.

Mr. Hodgin: You may state if you know what would have prevented the cars that were left standing on the track without an engine, what should have been done to prevent them from running back.

Mr. Thompson: That is objected to as being away without any issue in the case, and as irrelevant, incompetent and immaterial, and no proper foundation laid, and this witness not qualified. The sole issue here is that the brakes had not been set.

Mr. Hodgin: We have proven that the hand brakes were not set, Your Honor.

Mr. Thompson: What more do you propose to prove then, let me ask?

Mr. Hodgin: Mr. Thompson, if you want to argue this matter, if you will address yourself to the Court I can get along better. We have proven that the hand brakes were not set. The charge is negligence in no setting the hand brakes. I am trying to find out from this witness, if he knows, and I think Your Honor appreciates this situa tion—we are necessarily compelled to call the employes of the other party here, in order to prove these facts, and I think the young man is trying to answer the questions fairly and honestly, but it is difficult for us. Now if he has had certain experience on that hill, three and a half months, I think we ought to be entitled to show by him what was necessary to be done in order to hold that train where it was left on that track. The weight of his testimony is for the jury, to be judged by his experience, as to whether or not he had sufficient experience to be able to judge absolutely or not, is for the jury, in my view of the matter, and we think we ought to be permitted to ask this question.

Mr. Thompson: And I submit, if the Court please, that this is broadening the issues and going away beyond what we are here on. Plaintiff's counsel has stated what was necessary, and he says this witness has answered whether that was done or not, and that is all within the issues, and certainly anything further is without the issues, and counsel has stated that he has asked him the only question

within the issues, and hence I renew my objection, that this is without the issues, and incompetent, irrelevant and immaterial.

Mr. Walters: This must be true, Your Honor, that something should have been done to have prevented the cars from backing down the grade. Whatever that something was that should have been done is the thing that we must prove in order to maintain our action. It isn't apparent that it would take a person with long experience or expert knowledge perhaps, to tell whether or not a freight car would back down the grade or stand still; it would be rather elemental as to what should have been done to have prevented that. That is the sole question here,—what would have prevented the cars from backing down the hill. That we think we must prove. If our friend says no, we need not prove it, I think of course it is quite simplified, but I think he hardly means it the way I understand it.

The Court: The difficulty about the proposition is, you are assuming that it is a matter of elementary knowledge that the cars wouldn't stand there. If that be true, of course you wouldn't need any expert testimony on that point. If you can show by this witness that there was a grade at this particular point, and I think perhaps he has already testified that the track was not level—

Mr. Hodgin: I think, Your Honor, he testified that it was the steepest part of Medbury hill.

The Court: I think I will let you ask him the question whether or not—that will be for the consideration of the jury—You may permit him to answer whether or not cars detached from an engine and without the hand brakes being set would have stood at that point, or whether they would have gone backwards of their own accord.

Mr. Hodgin: I was just coming to ask that question.

The Court: You may ask the question, and I will hear you, Mr. Thompson.

Mr. Hodgin: Mr. Coffelt, based upon your knowledge of the grade at that point where this particular train stopped and your experience as a brakeman, I will ask you whether or not cars, 32 cars, freight cars, detached from the train, would stand on that grade at that point without the brakes being set?

The Court: Just a moment, before you answer.

Mr. Thompson: I object that no proper foundation has been laid, that there is no assumption of facts in the question which purport to be the facts surrounding the circumstances involved in this case, that this witness has not qualified himself to answer, and that this question is irrelevant and outside of any issue in the case. This witness doesn't purport to know or have experience or be

qualified and he doesn't claim ever to have tried anything that he can testify on the subject. I submit, Your Honor, it is a mere conclusion that he would undertake to testify to. That goes to the foundation now, clearly. Has he ever seen it tried, or tried it? If he has, I grant you probably he is qualified, and if not, they are simply trying to get this witness to reflect that which Judge Walters says is so simple, that is to say, they are asking him only for his conclusion and not anything that this witness is qualified by any observation or experience to testify about.

The Court: The objection is overruled.

Mr. Thompson: Save an exception.

(Last Question read).

Mr. Thompson: You are speaking of hand brakes, Mr. Hodgin?

Mr. Hodgin: Yes, hand brakes.

- A. Yes, they would stand with a sufficient number of hand brakes.
- Q. Well, if no hand brakes were set would the cars stand at that particular point?
- A. At that time I would be incapable of answering that question.
- Q. Those cars didn't stand at that point, did they?

The Court: The cars went backward for some reason. That is obvious.

Mr. Hodgin: Do you know what caused the cars to run backwards?

A. I couldn't say.

M. A. RICKS, a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

I am a locomotive engineer residing at Glenns Ferry, Idaho. Have been an engineer eight years, employed on the Oregon Short Line Railroad. On January 10, 1920, left Glenns Ferry on the leading engine, which was the road engine, with a train Extra 2010. At that time had been running trains over Medbury hill in the neighborhood of two years. The train stalled on the hill. It stopped—could not pull it. Do not know why. I had in that train 55 cars. When we stopped I whistled out a flagman by giving one long and three short whistles, and stood there for five or six minutes and pulled up to Chalk. Conductor Griffith was in charge of the train which was cut in two. One engine was left at Chalk siding and my engine and another one went back down the hill. Do not know whether any brakes were set on the cars left standing on the grade, which with the exception of one mile, is about the same as it is any part of the hill and steeper than the rest of the road, except that there are other grades on the hill just as steep at this point. Had never before stopped on Medbury hill. Don't know of any custom with reference to setting hand brakes on a freight train stopping on a grade, except that either hand brakes or air brakes should be applied on a hill to hold the train from running back. When the train is cut in two and the air brakes are not applied, it is then customary to set hand brakes.

Q. I will ask you whether or not it was necessary to set the hand brakes on those 32 cars in order to hold them on that grade.

Mr. Thompson: I object to that on the ground that this witness hasn't shown himself qualified; there is no proper foundation and it is incompetent, irrelevant and immaterial. This witness says, I think, that he has never stopped on this hill before.

The Court: I think I will permit you to ask him this question, as to whether or not in his judgment it was necessary to have brakes of some kind applied to hold the cut-off cars at that point.

Mr. Hodgin: I will ask you, Mr. Ricks, whether or not in your judgment it was necessary to have some kind of brakes applied on thosec ars that were cut off from the train, in order to hold them on the track?

Mr. Thompson: The same objection.

The Court: Overruled.

Mr. Thompson: An exception.

A. Yes, it was necessary to set brakes.

Mr. Hodgin: Were the brakes applied on those cars, if you know?

A. I don't know.

Q. When the train was cut in two, that cut the air brakes off, did it not?

A. It cut the train line but not the brakes.

This train was equipped with air brakes which were handled from the leading engine, and I was handling the air on the train until the train was parted. When the train is cut in two I have no control beyond where it is cut off.

The Court: What is the effect of cutting the train in two, so far as the air brakes are concerned on the cut-off portion of the train?

A. It allows the air to escape and the brakes apply on the portion that is cut off.

The Court: When the train is cut in two the air brakes are automatically applied to the cut-off portion?

A. Automatically applied. I have known cars to hold air for three days.

Mr. Hodgin: What would be the effect on these cars if the air should give way on one car, if the air should leak out on one car, what would be the effect on the others standing on that grade?

Mr. Thompson: I object that that is incompetent, irrelevant and immaterial, and outside of any issue in the case, and this witness is not qualified.

Objection overruled and exception saved.

A. It would allow one car to start.

The Court: You mean when one car starts it simply releases the brakes on the others?

A. On that car.

Mr. Hodgin: What effect would it have on the other cars, if that occurred?

The Court: That is, if it would have any.

Mr. Thompson: That is objected to as incompetent, irrelevant, and immaterial, and outside of any issue in the case.

The Court: Is this the negligence you allege?

Mr. Hodgin: Yes, Your Honor. No, Your Honor, we allege that the negligence consists of failing to set the hand brakes, and we want to show by this witness that if the air leaked out of one car and it struck the other car,—there is some slack in there,—and it struck the other car, what would be the result on those others, even though the air was on,—show that it is necessary to set the hand brakes. That is what this evidence goes to, and Your Honor will appreciate our situation with these witnesses.

The Court: No, I can't say that I appreciate your position. I don't know just what you mean, Mr. Hodgin. You have stated several times that the court must appreciate your position. Now it was possible for you to get a witness to show precisely what this grade was, without resorting to railroad employes, and it would have been entirely possible for you to have brought witnesses who

might be competent to testify as to whether or not railroad cars standing without the application of any brakes would run back on a grade of that kind. Now, of course, as to just how far this witness is competent to answer some of the questions you are asking it is very difficult to say. You suggest that there must have been some slack. That is an assumption that I think is not necessarily true.

Mr. Hodgin: Well, I will ask the witness. He can tell us.

The Court: Yes, ask him any question that he knows, anything about.

Mr. Hodgin: Mr. Ricks, you may state what is the relation of freight cars when they are coupled together in a train, with reference to their being tight or some slack?

- A. Ahead of the helpers there won't be any slack, ahead of the helpers.
 - Q. How about behind the helpers?
 - A. Behind the helpers it varies.
 - Q. Can you state the amount of the slack?
 - A. No, I can't.
- Q. Can you give us any figure as to the slack between the cars behind the helpers?

Mr. Thompson: Just a moment. I submit that this is outside of any issue in the case, and calls for speculation or conjecture on the part of the witness, and not anything that he knows of. And while we are on that, I have assumed that the

court, who has shown already that he is quite as familiar with the pleadings as some of counsel, I have assumed that the court would appreciate the limitation of the issues here, and I call attention to the third paragraph of the sub-division numbered six. There are the sole averments of negligence, and that is the only issue with which I am charged, and the only issue that I have been called upon to meet. Now counsel are going outside of anything that I feel that I have been required to anticipate or to meet, and it is upon that ground that I have been interposing the objections that I have. And with this statement I hope the record may be clear and the court will understand my position. I object to anything except proof of what is pleaded in sub-division six, and I concede that everything complained of with reference to the management of the train is pleaded in the third paragraph of that subdivision.

The Court: I understand counsel's objection. I think I shall have to overrule the general objection that the plaintiff cannot go into this matter of hand brakes. As I understand, the particular charge of negligence is that the hand brakes were not set. Now the plaintiff is trying to show that it was necessary, under the circumstances there, to set or use the hand brakes, and this particular evidence is to that point; in other words, that the hand brakes ought to have been set, if they weren't set.

He is trying to show that the train would not stand there without the application of brakes, and that it was not sufficient to rely upon the use or the automatic application of the air brakes, and that hence it was negligence not to use the hand brakes. Now just what the facts may be as to the air brakes is not very clear as yet.

Mr. Thompson: Of course I regret that the court takes that view of it, because, as I have said, they certainly have not charged that it was necessary to do anything but to set the hand brakes. They said that that was necessary, and not done, and I don't make this statement by way of argument to the court, but simply as to the subject, that I may stand properly upon the record.

Mr. Hodgin: I will ask you this question, Mr. Ricks. If the air failed to work on those cars left standing on the grade there, would they stand without the setting of the hand brakes?

Mr. Thompson: Of course I will have to protect my record under this theory. If we can safely have a standing objection to all testimony with reference to air brakes or what air brakes would do or would not do, and all matters beyond the application of hand brakes, and whether they were or were not set, I will save, if court and counsel desires, an objection and exception to all testimony with reference to air brakes, and what they would do or would not do, and what was done or was not

done, if anything, in that respect, outside of hand brakes.

The Court: That may be understood, so far as the objection of relevancy or materiality is concerned. I shall expect you to make any objection to the competency as to each particular question, because I can't anticipate what they are going to ask.

Mr. Thompson: Yes.

Mr. Hodgin: Now will you read the question, Mr. Reporter.

(Question read).

Mr. Thompson: Just a moment. I object that that is not an expert question.

The Court: Overruled.

Mr. Thompson: It calls for the conclusion or opinion of the witness.

The Court: Objection overruled.

Mr. Thompson: Save an exception.

The Court: You may answer.

Witness: The question was—

The Court: The question is, whether the cars would stand there really without any brakes applied.

A. Well, being as I never tried it, it is hard for me to tell.

The Court: No,—but in your judgment—that is the question.

A. No, I hardly think they would, that is, if no brakes were applied.

The Court: If no brakes at all were applied, either hand or air?

Mr. Hodgin: What was the condition of the weather that morning, Mr. Ricks?

- A. Cold.
- Q. What was the condition of the rails?
- A. Frosty.
- Q. Would that have any effect on cars standing on the track?
 - A. No.
- Q. Would it have any effect on your ability to pull the train?
 - A. No.
 - Q. It would not?
 - A. No.

DAN SULLIVAN, a witness for the plaintiff, being first duly sworn, testified as follows:

Am a locomotive engineer and have lived at Glenns Ferry, Idaho, for about two and a half years. On the night of January 10, 1920, went out from Glenns Ferry with a light engine to help freight train 2010 over Medbury hill. This train stalled on the hill a mile east of Chalk. It was steep but not the steepest part of the hill. We were over the steepest part of the hill. We were over the steepest part of the hill. The train was cut in two and 33 or 34 cars left standing on the track. Those cars backed down the hill and collided with 17. The

air brakes were set on these cars. Do not know whether hand brakes were set.

Q. You may state whether or not, if the air brakes on those 33 or 34 cars failed, whether they would have stood on the track where they were left.

Mr. Thompson: That is objected to as not being an expert question.

The Court: Sustained.

Mr. Hodgin: You may state whether or not, if no brakes at all were set on those cars, would they have stood where they were left?

A. No; if neither hand brakes nor automatic brakes were set, they wouldn't have stood.

Do not know of any custom with reference to setting brakes on Medbury hill on the portion of the train left standing on the track. Went with the front end of the train up to Chalk and returned again to the point where the cars had been left standing on the track, which consumed about twenty minutes, and upon arrival at such point the cars were gone.

Mr. Hodgin: You may state, if you know, why those cars ran away down the bill.

A. No. I don't know.

B. F. SMITH, a witness for the plaintiff, being first duly sworn, testified as follows:

Have been a locomotive engineer for 25 years and reside at Glenns Ferry, Idaho. Have run an

engine over Medbury hill off and on for the last 11 years. On the evening of January 10, 1920, and the early morning of January 11, 1920, was helping passenger train 17 at the time of the accident. We left Medbury on seventeen and ran against a red block on the hill and stopped, and as we were standing there the rear portion of a freight train came down and ran into us.

Mr. Hodgin: I want to prove that this contract of shipment was in Mr. Good's effects.

Mr. Thompson: You wish to establish that, and then offer it in evidence, do you?

Mr. Hodgin: Yes.

Mr. Thompson: We will agree that that was so, then, and that it may be received in evidence.

Contract was offered in evidence as plaintiff's Exhibit No. 1, and by the Court received.

- Q. What is the condition of the grade at as near Chalk with reference to the balance of Medbury hill?
 - A. It is not as steep as the rest of the hill.
 - Q. Is it steep or is it a grade?
 - A. Oh no, it is a grade.

I will ask you if 33 or 34 freight cars were cut off and left standing without an engine, it would be necessary to set the hand brakes in order to hold them on the grade at that point.

A. I couldn't say.

- Q. I will ask you whether or not, if 33 or 34 freight cars were cut off and left standing on the grade at that point, and no brakes were set at all, would they remain standing?
- A. I don't think they would. During my experience I have pulled several hundred trains up Medbury hill and possibly as many down Medbury hill. Have always had occasion to apply the brakes going down hill, and it has never been necessary in my experience to set the hand brakes going down the hill, because the air brakes always did all of it.
- Q. If the air brakes failed to work, would it be necessary to set hand brakes?

MR. THOMPSON: I object to that as calling for a mere conclusion and deduction of the witness, and not an expert opinion.

Objection overruled and exception allowed.

A. Yes, sir.

MR. HODGIN: Then if 33 or 34 freight cars were left standing on Medbury hill at or near Chalk siding, and the air on them failed to work—I will put it this way—would it be necessary to set the hand brakes in order to hold them on the grade?

Question objected to and objection sustained.

MR. HODGIN: I think the question he answered, Your Honor, was, if no brakes were set, my recollection of it. I may be wrong about it.

THE COURT: I understand this question to be the same. If the air failed to work and the hand brakes were not set then there would be no brakes. MR. HODGIN: Yes, that is true. That is all. MR. THOMPSON: That is all.

MR. HODGIN: If the Court please, we have finished with that branch of the testimony, and we will start with another branch of it, after the noon recess.

GEORGE SCHWANER, a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

I reside at Richfield, Idaho, and have been employed in the First State Bank at that place since September 1, 1910. Was acquainted with Henry M. Good during his lifetime, since some time in 1916. His business was principally farming and he did business with my bank in 1918 and 1919. His cream checks and grain checks for the year 1918 totalled \$2308.93, and for the year 1919 \$2388.25. I cannot say from my own personal knowledge where the cream came from, and that is also true of the grain.

J. H. LANE, a witness for the plaintiff, being first duly sworn, testified as follows:

I have resided at Richfield, Idaho, since 1904, and engaged in the farming and sheep business, and was acquainted with Henry M. Good for about four years. Was acquainted with the extent of his farming operations, which consisted of raising grain and hay and mostly wheat, with some dairying and hog feeding. His health was good, and he was an efficient farmer. The going wages for

farm labor in 1918-1919 was from \$100.00 to \$150.00 a month and board. The price of farm labor has been a somewhat fluctuating thing of recent years, and has been reduced within the past year or six months, and labor is easier to get now than a year ago. Within the past six months the wages of farm laborers or sheep laborers has been reduced approximately thirty per cent. The wages of foreman has been more and they are not subject to much fluctuation as common farm labor.

HENRY FULLBRIGHT, a witness for the plaintiff, being first duly sworn, testified as follows:

I am a farmer and have resided about three and a quarter miles east of Richfield since 1910, and was neighbor to Henry M. Good and knew him in his lifetime. He was a good farmer; condition of his farm was exceedingly good. He raised wheat and alfalfa and engaged some in dairying and hog raising. His crops in 1916 and 1917 were average crops, but in 1918 and 1919 they suffered some because of water shortage. Ordinary farm labor in 1918-1919 received from \$100.00 to \$150.00 a month and board in the summertime. There are very few that work the year around.

Plaintiff's counsel offered in evidence the American Mortality Table, based on American experience, contained in Volume 20 of the American Encyclopedia of Law, Second Edition, at page 885, showing the expectancy of life of a person 38 years

of age to be, according to that Table 29.62 years.

A. L. FLETCHER, a witness for the plaintiff, being first duly sworn, testified as follows:

Prior to December, 1920, I resided at Richfield, Idaho, and resided there in January, 1920. Am Attorney at Law. Knew Henry M. Good in his lifetime, and about the middle of January, 1920, Mrs. Good employed me to present claim and protect her interests and do whatever seemed proper in the matter. I forwarded duplicate copies by Registered mail with request for return receipt papers marked Plaintiff's Exhibits Nos. 6 and 7. Upon mailing the papers I received from the Postmaster Plaintiff's Exhibits Nos. 3 and 4, being Registry receipts. The paper marked Plaintiff's Exhibit 5 is the receipt for Registered letter sent to the General Manager of the Oregon Short Line Railway Company at Salt Lake City, Utah. Exhibit No. 6, is the return receipt for the letter sent to Mr. Hines, the Director General of Railways. Plaintiff's Exhibit No. 7 is a carbon copy of the claim. As far as I am able to say, the subscription on the envelopes correspond to that appearing on the receipts of the Postmaster.

The exhibits were offered in evidence and the following objections made thereto:

MR. THOMPSON: The defendant objects to the offers, first, with reference to the receipt numbered—first with reference to the receipt numbered—first with reference to Plaintiff's Exhibit

No. 4, purporting to be for a letter addressed to Walter D. Hines, Washington, D. C., and the receipt purporting to be Plaintiff's Exhibit No. 6 and bearing the words in ink, "W. D. Hines," name of addressee, and on the line "Signature of addressee's agent, "B. Wilsar," upon the ground that those two exhibits are irrelevant and immaterial, and do not establish the mailing of a notice to or the receipt of a notice by Walker D. Hines, or Walker D. Hines, Director General of Railroads, or by the Director General of Railroads of the United States. The defendant also objects to the introduction of Plaintiff's Exhibit No. 5, upon the ground that that is directed to General Manager O. S. L., Salt Lake, Utah, and although it is a registry receipt, with request for return receipt desired, and as we know in the ordinary course of events, if it was delivered, the return receipt would be had, and no return receipt is shown to have been issued, and the delivery in the usual course of registered mail not proven, and that it is irrelevant and immaterial that such a notice was sent to the General Manager of the O. S. L. at Salt Lake City, Utah, or elsewhere. And defendant objects to Plaintiff's Exhibit No. 7 as being introduced in evidence, upon the ground that it is not shown by the evidence-

WITNESS: I don't like to interrupt there, but, if the Court would permit me, I would like to modify an answer I have made.

MR. THOMPSON: After I am through, Mr. Fletcher.

And that such claim or purported claim was ever delivered to or received by the General Manager of the carrier, either within thirty days after the accident or injury, or at all. And objects to the general introduction of that exhibit upon the ground that it is self-serving, and embraces a series of self-serving declarations, incompetent, and improper to be submitted to the jury, and upon the final ground that neither of said exhibits prove such presentation of claim to the General Manager of the carrier within thirty days after the occurrence of the injury.

THE COURT: You say you desire to correct your answer in part? You may do so now, sir.

A. The claim sent to the Short Line was addressed to the General Manager of the Oregon Short Line, and in that respect the address on the envelope varied from the receipt. The Postmaster has used the initials, because, the receipt wouldn't contain the full name. That is the exception I wish to make.

Mr. Thompson: Then that one that you say was sent to the General Manager of the Oregon Short Line was addressed how?

A. General Manager, Oregon Short Line Railway Company, Salt Lake City, Utah.

MR. THOMPSON: Then I renew my objection upon the same grounds, and upon the further

ground that a notice to the General Manager of the Oregon Short Line Railway Company was not a notice to the General Manager of the defendant carrier then in charge of the operation of the railroad.

THE COURT: The objections will be overruled. MR. THOMPSON: We will save an exception. MR. HODGIN: The exhibits will be admitted,

Your Honor?

THE COURT: Yes.

MR. HODGIN: And be read to the jury now or later on?

THE COURT: Well, unless it is waived, they should be read at the present time. When you offer to read the claim to the jury I will say to the jury that it is merely showing your compliance with the contract, and they are not to consider any statement made therein as evidence of the fact.

MR. HODGIN: We don't care to waive any rights, but we don't care to read the claim unless it is necessary to do that.

MR. THOMPSON: Can it not be agreed then, without waiving the rights of either party, and saving the objections and exceptions which I have to Plaintiff's Exhibit 7, that Plaintiff's Exhibit No. 7 is for the Court to say whether as a matter of law the condition of the contract was performed, and is not for the jury anyhow.

THE COURT: Very well.

MR. HODGIN: Yes.

MR. HODGIN: Then I take it is not necessary to read these—

THE COURT: It is not necessary then, in view of that understanding, to read them to the jury.

Plaintiff's counsel then stated that they rested, whereupon defendant's counsel announced that the defendant rested, and moved the Court for a directed verdict in favor of the defendant, and a dismissal of the action as follows:

MR. THOMPSON: The defendant, by its counsel, after the plaintiff and defendant have rested, respectively, moves the Court for a directed verdict in favor of the defendant and a dismissal of the action, upon the following grounds:

1. Because by the plaintiff's proof it has been made to appear that at the time of the collision which constitutes the basis of this action or out of which the plaintiff's claim has arisen, Henry M. Good was riding on a shipping contract or agreement with the carrier, which provided what claim in writing should be presented to the General Manager of the carrier on whose line it occurred, and unless such notice should be given within thirty days after the date of the accident or injury, no claim for personal injury should be valid or enforceable, and that it does not appear from the evidence that any claim in writing was given within thirty days to any person who was general manager of the United States Railroad Administration in charge of the railroad operation.

The defendant bases its motion upon the ground that the plaintiff's right of action is based upon the averments of the complaint that the train on which the plaintiff was riding had become stalled on a grade, and that while said train was so stalled the agents, servants and employes of said Director General having charge of said train, or some or all of them, carelessly and negligently caused said train to be cut in two, and the said agents, servants and employes of said Director General having charge of said train, or someone or all of them, carelessly and negligently left or caused to be left standing on the track a large number, to-wit, about 22 cars of said train; that the said agents and servants and employes, or some one or all of them, carelessly and negligently failed to set, or cause to be set, the hand brakes on the cars so left standing on the track, the negligence alleged to have been the cause of the injury being that the defendant, through its agents and servants, failed to set the hand brakes on the cars, and that the collision or the escape of the cars was thereby caused, but that the plaintiff has failed to prove this. And the plaintiff has failed to offer sufficient proof to support a verdict of the jury that Henry M. Good came to his death in consequence of the failure of the defendant, through its agents and servants, or otherwise, to set the hand brakes, as complained of, or at all, or that the collision was caused or the escape of the cars, and the

death of Henry M. Good, by any act of negligence of the defendant alleged in the complaint.

It appears to me that the case has been tried on the theory that the doctrine of res ipsa loquitur applies, which it does not, because the particular cause and manner of the accident has been alleged, and the plaintiff has assumed the burden and been under the obligation of proving it. All that the proof shows is this, that the train was stopped on the track at a point near Chalk, that it was cut in two, and that the air brakes were set on the train, Engineer Sullivan testifies. It is not shown that in the ordinary course of events that would not be ample precaution for the protection of the train and for holding it on the hill, the only evidence on that subject being that of Engineer Ricks, that air would sometimes hold for as much as two or three days. The testimony of Engineer Sullivan is that from the time that his engine was cut off from the cars to the time he returned to where they had been did not exceed twenty minutes, and there is no proof whatsoever that independent and apart from hand brakes the air brakes should not in the ordinary course of events and in the exercise of ordinary care have held that train for far in excess of twenty minutes or two or three hours or two or three days. The situation is then merely this, that they show, it is quite true, that hand brakes were not set; also it does not appear that the train was not chained to the rails, let us say, and many other

things done; but it is not shown that the exercise of reasonable care for the holding of the train demanded that the hand brakes be set. That is the situation. The plaintiff is under the burden of establishing that. The plaintiff even undertook to establish that, and in that they have wholly failed, I submit.

MR. HODGIN: If the Court please, our position is simply this: that negligence is the omission of some act of the defendant here which it owed to the deceased in that particular situation. Now the proof shows that the hand brakes, and counsel admits that the hand brakes were not set. There was the omission of an act that, under due care, could have been exercised. That was a duty owed to the deceased, to set those hand brakes. It is true that the evidence shows that when the train was cut in two ordinarily the air brakes set themselves, but there is no evidence here that they did set themselves in that instance. Nobody examined the train apparently. But however, the fact remains that those cars ran away; that is admitted by the defendants. And it is in evidence I think by one of the witnesses that if the hand brakes, enough of them, had been set, it would have held those cars on the track. It seems to me that that tells the whole story, except this, that if, as I understand the rule, if there is evidence tending to show negligence on the part of the defendant or his agents or servants here, then that evidence, that is a question

of fact to go to the jury. If there is some evidence tending to show negligence, then it should not be taken away by the Court, but should be submitted to the jury, under proper instructions, to be determined as any other fact in the case is determined. We think that is a complete answer to counsel's statement. He admits that the brakes were not set, and that we have proven that. You admit that in your argument. He admits—

MR. THOMPSON: The hand brakes, you mean? MR. HODGIN: Yes, the hand brakes were not set, that is what I mean. It is admitted that the cars ran away, and that by reason of the cars running away the deceased was killed. There are sufficient facts to send this case to the jury, there is no question in my mind about it.

One other question with reference to the notice. Counsel hasn't argued that. The exhibits introduced show that the notices were mailed on February 2nd and—I think it is Exhibits 4 and 5,—the accident occurring, according to the evidence, on January 11th, and that would be within thirty days.

MR. THOMPSON: The evidence shows that the escape of the cars directly came about by the air brakes failing. There is no issue of failure to properly inspect the air brakes or of failure to use reasonable foresight and care in maintaining the air brakes, and there is no evidence that the air brakes would not have held the train ordinarily or at all.

Hence there is no evidence that setting of hand brakes was necessary, but over and beyond that, it was not shown by the evidence that it was either customary or necessary to set hand brakes in addition to air brakes being set, or that ordinarily the air brakes would not or should not hold. So that the situation is, as I say, there is an utter absence of proof, failure of proof, that the cause of the accident was the failure to set hand brakes, which, in the exercise of reasonable care by the defendant operating a train with air brakes which were set should have been set. So that the case comes down to either this, I submit, that the plaintiff must establish his case under the doctrine of res ipsa loquitur or not at all. For my part, I should be pleased to know if counsel relied on the doctrine of res ipsa loquitur or if they conceive that they have established a case under the doctrine of res ipsa loquitur.

THE COURT: I haven't been quite able from the beginning to understand upon what theory the plaintiff has tried the case. It would seem to me that she has assumed unnecessary burdens from the beginning. As I understand, it was conceded that the deceased at the time of the accident was a passenger on this railroad train. Therefore the defendant owed to him a high degree of care in protecting him against injury. There is the further well known presumption that in such a case, where a passenger is injured or killed as a result of a collision between trains, the presumption of negli-

gence arises. I don't think it was necessary for the plaintiff to go further than to show that the accident occurred that is, that the death occurred, as the result of the collision, nor was it necessary to introduce the contract under the pleadings. So that the only question is as to whether or not, by doing that, which was unnecessary to do, the plaintiff has exculpated the defendant from the presumed negligence. I do not think the evidence goes that far. In some respects perhaps it tends to, but at the same time it has not gone so far, it has not gone as far as it would have been necessary for the defendant to go if the burden had been assumed by it, as was necessary in a strict trial of the case. It has not been shown that the cars ran away by reason of the interposition of some strange force, either that resulting from an act of God or of a trespasser, a third person. The accident was due to the failure of the defendant to do something which should have been done.

MR. THOMPSON: If you will pardon me,—I do not wish to interrupt you at all, but lest you might have in mind ruling at the end of your remarks, I desire to say, if you had that in mind, that there are three federal cases, two of them, or one at least, of the Ninth Circuit Court of Appeals, that I think Your Honor would be glad to have me read from before you finally rule.

THE COURT: Upon what point?

MR. THOMPSON: On the very point that you have been discussing, as to whether, by the plaintiff having assumed that burden, he was bound to establish it, or whether he might rest on any inference under the circumstances. The Eighth Circuit Court of Appeals announced it quite clearly and definitely and the Ninth adopted it and made it final, and the Eighth reiterated it, all within the past two or three years. The cases are the Great Northern, 251 Federal, 826, Ninth Circuit Court of Appeals—

THE COURT: Perhaps you would better get the cases, because I want to dispose of the motion now, 251 Federal, you say?

MR. THOMPSON: 251 and 246 and 217.

THE COURT: Is 251 the case from the Ninth Circuit?

MR. THOMPSON: Yes, Your Honor. But the argument for it is found in the preceding one,—I think it is 246.

(Mr. Thompson then read from the cases referred to).

THE COURT: It must be admitted, gentlemen, that back of the rule announced in one or two of these cases at least, there are pretty strong reasons. That is, if a plaintiff comes in and alleges specific negligence, there is an implied disclaimer of any other negligence, and the defendant perhaps wouldn't be under the obligation to prepare its case in such a way as to meet all contingencies, in other

words, to discharge its ordinary obligation where the pleading is in the ordinary form, of showing that it used all foresight which was humanly possible, and care, to avoid the accident. I am very seriously doubting whether I can submit the case to the jury upon the theory that I had in mind, that, is, the general theory that the burden was upon the defendant to show that it had done all that was possible to avoid this accident.

MR. THOMPSON: I might suggest to Your Honor, even the complaint having thus specified, and my motion of the established law being as announced, Your Honor's remarks raise the question in my mind at once,—what now should we do, the air brakes having failed, if the burder of proof is upon us? Doesn't it consist of making preparation and a presentation which was wholly unanticipated by us, which was deemed to be unnecessary?

THE COURT: The question is whether you aren't in this delema, Mr. Thompson. If it be assumed that the hand or service brakes were not used in this case, as I must for the purpose of this motion, then it would appear that you must take one alternative or the other, either that ordinarily the use of the air brakes is sufficient to avoid an accident of this kind,—I was going to say if you assume further that it was necessary to use some sort of a brake here because the train of cars was upon a grade,—then it must either appear, to exculpate you from the charge of negligence, that gen-

erally speaking, in fact substantially always, the air brakes would have been sufficient and efficient to have prevented this accident. That hasn't been done.

MR. THOMPSON: No. It merely appears that they were set. Sullivan says so. And that there are air brakes.

THE COURT: Yes, one witness testified that the air brakes were set.

MR. THOMPSON: And there is no proof that air brakes properly equipped would not hold. In fact, the proof is to the contrary, so far as there is any proof.

MR. HODGIN: Except the fact, Your Honor, that they didn't hold.

MR. THOMPSON: Yes, and that doesn't make a case for you.

THE COURT: I was going to say, it would seem to me that you must either show that the air brakes ordinarily do hold, and when I say ordinarily, I mean substantially always, if you are going to measure up to the high degree of care that is required to protect passengers from injury, or you must show that the accident in this case occurred by reason of some extraordinary thing that you could not foresee.

MR. THOMPSON: If the doctrine of res ipsa liquitur applies, yes.

THE COURT: Applies in your favor, you mean?

MR. THOMPSON: No—applies against us.

THE COURT: Here is a train equipped with hand brakes. Presumably they are to be used for some purpose. So far as appears, the accident could have been avoided by setting the hand brakes.

MR. THOMPSON: And so far as appears, it appears that it could have been avoided by the setting of the air brakes.

THE COURT: It doesn't appear that ordinarily the air brakes would or would not have been sufficient.

MR. THOMPSON: Then may I inquire, in order that the plaintiff may establish his case, if the failure to set hand brakes was negligence and the promimate cause, are they not under the burden of showing that the setting of the air brakes was insufficient, that they alone would not hold?

MR. HODGIN: If the Court please, the fact that the train ran away is the best evidence that the air brakes were not sufficient.

MR. THOMPSON: Yes, but that doesn't prove anything.

THE COURT: No. Of course that is evidence that they didn't hold in this particular case, that is true, but here is a train equipped with two kinds of brakes. The cars are upon a heavy grade. Now it is admitted that you didn't use all of the appliances at hand to prevent the accident.

MR. THOMPSON: It isn't established that they were necessary.

THE COURT: The evidence is pretty meager upon that point, gentlemen, but I can't get away from the thought that if we apply to the defendant the well known rule requiring a high degree of care, I can't get away from the thought that the evidence is sufficient to go to the jury upon that point. It is true that there is no evidence except the mere fact that the train ran away, that the hand brakes were absolutely necessary. The train was supplied with both, and the hand brakes apparently would have given an additional measure of safety. It was entirely possible to use them. There can be no question, therefore, that they would have given an additional measure of safety, and, if so, the highest degree of care possible was not used.

MR. THOMPSON: Well, I could supplement that. Of course I don't like to apply ridiculous—

THE COURT: Of course I know you might say that they could have chained the train to the mountain side; I fancy you are going to say that. But here is a train equipped with two kinds of brakes, a double precaution. I don't know that it is a presumption, of course, that they should be used in all cases of this kind, but as I say, I have difficulty in getting rid of the idea that if you were going to be duly careful of the safety of the passenger, under the circumstances here existing, both should have been used. There is no evidence that the air brake is under the control of anyone

after the train breaks in two; they are set, and they may be released. Now the testimony, inferentially, at least, may be so interpreted as to show that when the train is cut in two, as in this particular case, the air brakes set; whether they always do not appear; there is evidence tending to show that the length of time that they remain set is somewhat uncertain, owing to leakage, as I understand, in the gaskets or the valves, hence there is a question whether or not in the exercise of a high degree of care, under the circumstances existing here, the hand brakes should not have been used.

MR. THOMPSON: It would certainly be upon us of establishing, if the plaintiff had not assumed the burden.

THE COURT: If the pleading were different, there wouldn't be any difficulty about it at all. I think I shall take that view, although I confess with some doubt as to its correctness. It is a close question. I think I shall take it, with the suggestion that, if you desire, I will open the case and permit you to put in testimony upon the point; but anyway I think I shall take that view, and you have that privilege or not, as you desire.

MR. THOMPSON: I regret, Your Honor, that I cannot avail myself of that privilege, owing to the fact that I have assumed from the manner of pleading that the plaintiff would be prepared to try the issue as made, and I have not the means at hand, nor have I made the investigation with the means at

hand of going forward on that theory in the present circumstances.

THE COURT: Yes, I appreciate that possibly you might not be able to do that. However, I think that I shall take that view, and I might consider it later, when I can give more time to it, and grant a new trial if the verdict should be against you. But at present, as I say, I have difficulty in getting away from that view of it—that it is a question for the jury as to whether or not you used the high degree of care required, and that the evidence is at least barely sufficient to require that that question be submitted to the jury, for the reasons I have already explained.

The motion for a directed verdict in favor of the defendant and a dismissal of the action was denied; an exception was taken by defendant's counsel to the ruling of the Court denying defendant's motion for directed verdict and dismissal of the action and was by the Court allowed, and on February 25, 1921, an order was made by the Court allowing thirty days within which to prepare and serve a bill of exceptions.

Thereupon the case was argued and submitted to the jury, and a verdict was rendered in favor of the plaintiff for \$21,250.00, which is of record herein.

The instructions to the jury were upon the theory urged by defendant that by the pleading of specific negligence the plaintiff assumed the burden proving such negligence, positively or inferentially and that it was not entitled to the benefit of presumption of negligence arising from the mere accident.

District of Idaho, U. S. Circuit.

I hereby certify that the foregoing bill of exceptions contains all the evidence in substance and proceedings given at the trial of the foregoing cause, and in substance all the evidence in the case; and that said bill of exceptions was served, tendered filed within the time allowed therefor and is now settled, signed and sealed as the bill of exceptions in this case on this 24th day of March, 1921.

FRANK S. DIETRICH,

District Judge.

Endorsed: Filed March 24, 1921. W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

ORDER EXTENDING TIME FOR SETTLE-MENT OF BILL OF EXCEPTIONS.

An application having made herein by counsel for the defendant, at the close of the evidence, on the trial of the above entitled action, for thirty days within which to prepare, serve and settle a bill of exceptions herein, and said application having been, then and there, by the Court allowed;

IT IS ORDERED that the defendant have, and he hereby is granted thirty days from the date of trial of the above entitled action, to-wit, to and including March 28th, 1921, within which to prepare, serve, settle and file a bill of exceptions herein.

Dated, Boise, Idaho, March 7, 1921.

FRANK S. DIETRICH,

District Judge.

Endorsed: Filed March 7, 1921. W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

ORDER SUBSTITUTING JAMES C. DAVIS AS AGENT.

OF THE GOVERNMENT.

Now, on this 8th day of August, 1921, appeared before me, H. B. Thompson, Esq., of counsel for the defendant, and Charles C. Cavanah, of counsel for the plaintiff, and on motion of counsel for the defendant, it is

ORDERED, that James C. Davis be and he hereby is substituted as Agent of the Government of the United States of America and defendant herein, in place of John Barton Payne, resigned, but that such substitution shall not in any way affect the validity of the judgment in favor of the plaintiffs rendered herein.

FRANK S. DIETRICH, District Judge.

Endorsed: Filed Aug. 8, 1921. W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.) STIPULATION.

It is hereby stipulated by counsel for the respective parties herein that the Judge of the above entitled Court may certify that the instructions given by the Court at the trial of said cause, as transcribed by the Reporter of said Court, are correct, and the same may be incorporated in and as a part of the record on appeal in the above-entitled cause.

WALTERS, HODGIN & BAILEY,
Twin Falls, Idaho.

C. C. CAVANAH,

Residing at Boise, Idaho.

Attorneys for Plaintiff. GEORGE H. SMITH.

H. B. THOMPSON, JOHN O. MORAN,

Pocatello, Idaho.

Attorneys for Defendant.

Endorsed: Filed Sept. 6, 1921.

W. D. McReynolds, Clerk.

By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

INSTRUCTIONS TO JURY

THE COURT: Gentlemen of the jury, this is a case ordinarily referred to as a death by wrongful act claim, that is, the plaintiff, Mrs. Good, both upon her own behalf and in the name and on behalf of

her young child, asserts that by reason of the pecuniary interest which they had in the life of the deceased, the husband and father, they suffered a damage in his death, that is a pecuniary loss in his death. And they assert that his death was due to the negligence of the defendant, and that, therefore, under the law, the defendant must respond to them in an amount which will compensate them for the pecuniary loss they have thus suffered. Such is the theory of the case.

As has been explained to you, they are the parties upon the one hand, and the government of the United States upon the other. While the railroad system upon which the accident occurred is that of the Oregon Short Line Railroad Company, it is admitted that at the time the accident occurred the trains were being operated by the Government of the United States, and therefore the corporation owning the property is not liable, but under the law the Government is liable, and the action is now against the defendant because, under a provision of a Congressional act by which the railroad systems were turned back to their owners, Mr. Payne is constituted an agent to represent the Government in such suits. I say that much to you in order that you may understand how it is that Mr. Payne is made defendant here. The action is really against the Government, although against Mr. Payne in name.

I hardly need emphasize before you that the fact that the Government is a party defendant should make no difference to you in the consideration of the issues which are presented, either as to whether or not there is a liability or of the amount that should be awarded, if you find the existence of such liability. The defendant here, so far as this suit is concerned, stands upon the same footing as an individual or corporation if such individual or corporation had been in charge of and in the management of the railroad at the time the accident occurred.

Now the first question for you to determine is whether or not the defendant, through his agents in charge of this train, was guilty of negligence, negligence contributing to the casualty or the death of Mr. Good. Generally speaking, the duty of one in charge of a railroad, whether it be the owner or lessee, or, in this case, the Government, and the agencies employed by such owner or one in charge, is to exercise a high degree of care for the safety of passengers who are being carried upon its trains. It is not an ordinary degree of care, but a high degree of care. Under the undisputed evidence in this case, Mr. Good, at the time he was killed, was a passenger, and hence, as such passenger, had the right to demand and to expect of the railroad company, or rather of the men in charge of this train, the exercise of a high degree of care for his safety. As has been explained to you by one of the counsel who have ar-

gued the case, generally speaking carelessness is the failure of a person upon whom a duty rests to exercise such care and foresight as prudent men having due regard for the safety of others and for their own safety, would ordinarily exercise under all the circumstances of the case, or the doing of something by such person which such prudent person would not do in view of all the circumstances of the case. You will see that there is no precise measure or yard stick by which we can determine whether or not certain conduct is careless or not, and it is left to you as jurymen to say whether or not what was done measures up to this general standard of which I have spoken. So here, bearing in mind the duty of persons in charge of this train to exercise a high degree of care for the safety of Mr. Good and any other passengers who may have been upon this train, did they exercise such care and foresight and prudence as men who are ordinarily prudent and careful would have exercised under the circumstances? If they did not they were guilty of negligence, and such negligence, of course, is chargeable to the Government inasmuch as these men were acting as the agents or agencies of the Government in operating the train. If upon the other hand, under all the circumstances of the case, you find that they did exercise such high degree of care as prudent men would under the circumstances have exercised then there was no negligence, and even though an accident occurred the Government would not be responsible. Under the pleadings in this case, gentlemen, and the record, you cannot find negligence merely from the fact that the accident occurred; in other words, you cannot find that the men in charge of the train failed to exercise a degree of care which they should have exercised, merely from the fact that the train ran back and collided with the passenger train. We know that sometimes accidents occur which reasonably prudent men, exercising due care, cannot anticipate or do not anticipate, and hence you cannot find that a man is careless merely because an accident occurs as a result of his failure to do something which he might have done. Of course most of us could have provided against such occurrence if we had merely anticipated that it would occur. So again I say to you that the mere fact that these cars ran down hill would in itself not be sufficient to warrant you in finding that the train men were careless. But you are to consider all of the circumstances in the case. If you find that the train was equipped with both air and hand brakes and the air brakes were set before the train was cut in two or when it was cut in two, and that the hand brakes were not set, and no effort was made to use the hand brakes, you will consider whether or not, in view of the fact that the train was carrying passengers, in view of the fact that apparently it was upon a grade, and in view of the fact that there were air brakes and the air

brakes were set, whether or not, in the exercise of such prudence and foresight as prudent men would have exercised under the circumstances, it was negligence to fail to set the air brakes as an additional precaution against the train or cars running away. If you find that that was the part of reasonably prudent men and it was not performed, then you should find that the defendant was negligent, through its agencies.

MR. HODGIN: Pardon me, Your Honor. You used the expression "air brakes," when I think you meant to say "hand brake."

THE COURT: I used both. I mean to say this: If you find that the train was equipped with both kind of brakes, and that the air brakes were set, and still, notwithstanding that fact, in the light of all of the other circumstances you still think that reasonably prudent men in charge of the train, train men, would have also set the hand brakes, as an additional precaution, and you further find that if such hand brakes, had been set the accident would not have occurred, then you may find that the accident was due to the negligence of the train men. As I tried to explain to you, before you can find they were negligent, you must find that they didn't, under all the circumstances, act as ordinarily prudent men would under like circumstances have acted, in protecting the train against such a possible catastrophe as occurred.

The charge here, gentlemen, in the complaint, is, that the defendant was negligent in that the cars were cut off the train upon this grade and that the hand brakes were not set, so that that is the only particular in which you can find that the defendant was negligent, if you find that it was negligent at all, that is, in cutting off the cars as they were cut off, upon a grade, without setting the hand brakes. The gist of the charge is that it was negligence not to set the hand brakes. You cannot conjecture or surmise that there was other negligence. Unless you find that the train men were negligent in not setting the hand brakes, your verdict must be for the defendant.

Now in the event you find there was no negligence on the part of the train men, causing the accident, your verdict, of course, will be for the defendant. If, upon the other hand, you find that they were negligent in not setting the hand brakes, then it would be your further duty to determine what the pecuniary loss of the plaintiffs has been by reason of the death of the husband and father. As I have already suggested to you, the only loss recoverable in an action of this kind is the pecuniary one. That is, it is the theory of the law that the verdict of the jury shall compensate the plaintiff, or plaintiffs, in this case, for the pecuniary loss thus suffered not at all for mental suffering, distress or grief. The law cannot make compensation for that. But the theory

is that the husband is of some pecuniary—that his life is of some pecuniary value to his wife, and that the life of the father is of some pecuniary value to the child, minor child, and it for this pecuniary loss that the law contemplates a recovery may be had.

You may consider in that connection the value of the services of the deceased to his wife, to his child, what he might have earned. You will consider that out of his earnings it would be necessary for himself to be supported. You will also consider the value of his association both to his wife and his child, the value of his advice and direction and general supervision of their lives and their affairs, and aim to arrive at some amount that will reasonably compensate them. This should be done dispassionately and without sympathy. It would be unsafe for you merely to take a suggestion made in one of the arguments, that the deceased's expectancy was so many years and that he was capable of earning so much, and multiply his expectancy by his earning capacity and award that amount. There are a great many contingencies and conditions to be taken into consideration, and unfortnately there is no such definite or fixed standard. Just what the deceased might have earned had he continued to live, whether he would have continued in good health, or whether he would have become ill, whether he would have earned more or less, we of course can't know to a

certainty. You gentlemen are all men of common sense, and you know how many contingencies there are in life. The young child here may live to the age of twenty-one or it may not. The life of any one of us of course, is uncertain. There is the possibility of re-marriage. All of these things in a way enter into the problem, so that you will see it is not simple problem, and, after all, its solution must be left very largely to the judgment and common sense of twelve men, without any attempt on the part of the Court to lay down any specific rule by which the amount can be computed.

It is suggested that I instruct you, and I do instruct you, although perhaps it isn't necessary, that there can be no thought of punishment in a case of this kind, no punitive damages; that is, you cannot award an amount which you think would punish the defendant for the negligence of its agents. Again I say to you, it is merely compensatory damages, an amount which will compensate the plaintiffs for their pecuniary loss, and nothing else. It should be reasonably adequate for that purpose, but not beyond it. As I have already explained, you should try to reach a conclusion free from any passion or prejudice by reason of the manner of the death of the husband and father.

It is necessary that all of you concur in finding a verdict. Two forms have been prepared. One you will use in case you find for the defendant, and the

other in case you find in favor of the plaintiff, and in the latter is left a blank for the insertion of such amount as you may award.

The bailiff may be sworn.

(Bailiff sworn).

JUROR: Your Honor, would I be permitted to ask a question?

THE COURT: Yes.

JUROR: In case this jury finds that damages are due and compensation allowed, would the jury have any right to decide as to how those damages should be paid; that is, is it to be paid in one sum or separately?

THE COURT: Well, unless I instruct you to the contrary later on, it may be in one sum. I am not at all sure that under the pleadings I can submit that question to you so that you may assume that unless you are instructed to the contrary, it should be in one sum, and in that case it would be for the Court to determine. Any other questions? If not, you may retire with the bailiff.

(The jury retired from the court room in charge of the bailiff).

The foregoing are the instructions given to the jury, September 6, 1921.

FRANK S. DIETRICH, Judge.

(Title of Court and Cause.)

PETITION FOR WRIT OF ERROR.

TO THE HONORABLE FRANK S. DIETRICH,
JUDGE OF THE DISTRICT COURT AFORESAID:

Now comes the defendant, James C. Davis, as Agent of the Government of the United States of America, by his attorneys, and respectfully shows that on the 25th day of February, 1921, a jury duly empaneled in said cause, found a verdict in favor of the plaintiff and against your petitioner for the sum of \$21,250.00, and upon said verdict a final judgment was entered on the 26th day of February, 1921, against your petitioner, defendant in the above entitled cause, in which verdict and judgment and the proceedings had prior thereto in this cause, certain errors were committed to the prjudice of the defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

That your petitioner is appointed and said judgment rendered against him as Agent of the United States, under the provisions of Sec. 206 of Act of Congress approved February 28, 1920, known as Transportation Act, 1920, and this writ is prosecuted by and for and on behalf of the United States.

Your petitioner feeling himself aggrieved by said verdict and judgment entered thereon as

aforesaid, herewith petitions the Court for an order allowing him to prosecute a writ of error to the Circuit Court of Appeals of the United States for the Ninth Circuit under the laws of the United States in such cases made and provided.

WHEREFORE, in consideration of the premises, your petitioner prays that a writ of error may be issued in his behalf to the United States Circuit Court of Appeals for the Ninth Circuit aforesaid, sitting at San Francisco, California, in said Circuit, for the correction of the errors complained of and herewith assigned and that the transcript of record, pleadings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals and that an order be made accordingly, and that all further proceedings be suspended until the determination of said writ of error by the Circuit Court of Appeals.

GEO. H. SMITH, H. B. THOMPSON, JNO. O. MORAN,

Attorneys for Petitioner in Error. Residence and post office address of H. B. Thompson and Jno O. Moran, Pocatello, Idaho.

Service of the foregoing peition admitted this 9th day of August, 1921.

WALTER, HODGIN & BAILEY, AND C. C. CAVANAH,

Attorneys for Plaintiffs.

Endorsed: Filed Aug. 9, 1921. W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

ORDER ALLOWING WRIT OF ERROR.

On this 9th day of August, 1921, came the defendant, by his attorneys, and filed herein and presented to the Court his petition praying for the allowance of a writ of error, and filed herein and presented an assignment of errors intended to be urged by him, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the Court does allow the said writ of error to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit the judgment heretofore entered in the above entitled cause on the 26th day of February, 1921, in favor of the plaintiff and against the said defendant.

FRANK S. DIETRICH, District Judge.

Service of the foregoing order admitted this 9th day of August, 1921.

WALTERS, HODGIN & BAILEY, AND C. C. CAVANAH,

Attorneys for Plaintiff.

Endorsed: Filed Aug. 9, 1921. W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

ASSIGNMENT OF ERRORS.

James C. Davis, as Agent of the Government of the United States of America, defendant and plaintiff in error herein, in connection with and as a part of his petition for Writ of Error filed herein, makes the following assignment of errors, which he avers occurred at the trial hereof, as appears from the record herein, and upon which the plaintiff in error relies to reverse the judgment entered herein:

1. The Court erred in overruling the defendant's objection to the following question propounded by plaintiffs' counsel to the witness Ricks:

"I will ask you, Mr. Ricks, whether or not in your judgment it was necessary to have some kind of brakes applied on those cars that were cut off from the train, in order to hold them on the track."

2. The Court erred in overruling the defendant's objection to the following question propounded by plaintiffs' counsel to the witness Ricks:

"What would be the effect on these cars if the air should give way on one car, if the air should leak out on one car, what would be the effect on the others standing on that grade?" 3. The Court erred in overruling the defendant's objection to the following question propounded by plaintiffs' counsel to the witness Ricks:

"If the air failed to work on these cars left standing on the grade there would they stand without the setting of hand brakes" or "whether the cars would stand there really without any brakes applied—in your judgment?"

4. The Court erred in overruling the defendant's objection to the following question propounded by plaintiffs' counsel to the witness Smith:

"If the air brakes failed to work, would it be necessary to set hand brakes?"

- 5. The Court erred in receiving in evidence, over the objection of defendant's counsel, plaintiffs' exhibits Nos. 3, 4, 5 and 6.
- 6. The Court erred in overruling and denying the defendant's motion for a directed verdict in favor of the defendant and a dismissal of the action.
- 7. The Court erred in submitting the case to the jury.
- 8. The Court erred in giving an entering judgment on the verdict of the jury in favor of the plaintiffs.
- 9. The evidence is unsufficient, under the issues, to support the verdict and judgment.

WHEREFORE, defendant prays that said judgment may be reversed with such directions as may be proper.

JAMES C. DAVIS,

As Agent of the Government of the United States of America, Defendant.

By

GEO. H. SMITH, H. B. THOMPSON, JNO. O. MORAN,

Attorneys for Defendant and Plaintiff in Error.

Residence and post office address of H. B. Thompson and Jno O. Moran, Pocatello, Idaho.

Copy received Aug. 9, 1921.

WALTERS, HODGIN & BAILEY, AND C. C. CAVANAH,

Attorneys for Plaintiff.

Endorsed: Filed Aug. 9, 1921. W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

WRIT OF ERROR.

The President of the United States of America to The Honorable Judge of the District Court of the United States for the District of Idaho, Southern Division—Greeting:

Because in the record and proceedings, as also in the rendition of the judgment in a cause pending in the District Court before you at the February term, 1921, thereof, between Harriett O. Good, as heir at law of Henry M. Good, deceased, and Henry Max Good, a minor, by Harriett O. Good, his mother and legal representative, plaintiff, against John Barton Payne, (James C. Davis substituted) as Agent of the Government of the United States of America, a manifest error hath happened to the great damage of the said John Barton Payne, as Agent of the Government of the United States of America, plaintiff in error, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly, you send the records and procedings aforesaid with things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit at the Court Rooms of said Court in the City of San Francisco, California, together with this writ, so that you have the same at said place within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held that the records and proceedings aforesaid being inspected, the said Circuit Court of Appeals may further cause to be done therein to correct that error, what of right and according to the laws and customs of the United States, should be done.

Witnesseth, The Honorable William H. Taft, Chief Justice of the Supreme Court of the United States, this 9th day of August, in the year of our Lord one thousand nine hundred twenty-one.

Issued at Boise, Idaho, with the seal of the United States District Court for the District of Idaho, and dated as aforesaid.

W. D. McREYNOLDS,

Clerk of the United States District Court for the District of Idaho.

Allowed by

(SEAL)

FRANK S. DIETRICH,

District Judge.

Copy received Aug. 9, 1921.

WALTERS, HODGIN & BAILEY AND C. C. CAVANAH,

Attorneys for Plaintiffs.

Endorsed: Filed Aug. 10, 1921. W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

CITATION.

The President of the United States of America to Harriett O. Good, as heir at law of Henry M. Good, deceased, and Henry Max Good, a minor, by Harriett O. Good, his mother and legal representative, and to Walters & Hodgin and C. C. Cavanah, her attorneys,—GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Ap-

peals for the Ninth Judicial Circuit to be held in the City of San Francisco, in the State of California, within thirty (30) days from the date of this writ, pursuant to a writ of error filed in the office of the Clerk of the District Court of the United States for the District of Idaho, Southern Division, wherein James C. Davis, as Agent of the Government of the United States of America, is plaintiff in error and you, the said Harriett O. Good, as heir at law of Henry M. Good, deceased, and Henry Max Good, a minor, by Harriett O. Good, his mother and legal representative, are defendants in error, to show cause, if any there be, why the said judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable William B. Gilbert, United States Circuit Judge, this 9th day of August, 1921.

FRANK S. DIETRICH, United States District Judge.

Attest:

W. D. McREYNOLDS,

Clerk of Said District Court.

Service of the within citation admitted this 9th day of August, 1921.

WALTERS, HODGIN & BAILEY AND C. C. CAVANAH, Attorneys for Defendants in Error. Endorsed: Filed Aug. 10, 1921. W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

PRAECIPE.

TO THE CLERK OF THE ABOVE ENTITLED COURT:

You will please embrace in the record on appeal herein the following, to-wit:

Original complaint.

Demurrer to original complaint.

Order sustaining demurrer.

Amended complaint.

Answer of defendant.

Verdict.

Judgment.

Bill of exceptions.

All exhibits offered in evidence.

Order extending time to settle bill of exceptions.

Order substituting James C. Davis as defendant.

Petition for writ of error.

Assignment of errors.

Order allowing writ of error.

Writ of error.

Citation.

Copy of this praecipe.

Return to writ of error.

Dated August 10, 1921.

GEO. H. SMITH,
H. B. THOMPSON,
JNO. O. MORAN,
Attorneys for Defendant.

Received Copy Aug. 10, 1921.

WALTERS, HODGIN & BAILEY, AND C. C. CAVANAH,

Attorneys for Plaintiffs.

Endorsed: Filed Aug. 10, 1921. W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

PRAECIPE OF APPELLEES FOR ADDITIONAL PARTS OF RECORD.

TO THE CLERK OF ABOVE ENTITLED COURT:

Under and by virtue of Rule 23 of this Court, appellees, Harriett O. Good, as heir at law of Henry M. Good, deceased, and Henry Max Good, a minor, by Harriett O. Good, his mother and legal representative, hereby designate the following additional parts of the record, which they deem material, and request that they be embraced in the record on appeal herein, to-wit:

1. All instructions given by the Court, to the jury, in the above entitled action, at the trial thereof.

Dated this 15th day of August, 1921.
WALTERS, HODGIN & BAILEY,
C. C. CAVANAH.

Attorneys for Plaintiffs.

Endorsed: Filed Aug. 17, 1921. W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

RETURN TO WRIT OF ERROR.

And thereupon it is ordered by the Court that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

W. D. McREYNOLDS,

Clerk.

Endorsed: Filed Aug. 10, 1921. W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

CLERK'S CERTIFICATE.

I, W. D. McReynolds, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered 1 to 97, inclusive, to be full, true and correct copies of the pleadings and proceedings in the above entitled cause, and that the same, to-

gether constitute the transcript of the record herein, upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit, as requested by the praecipe filed herein by the Plaintiff in Error.

I further certify that cost of record herein amounts to the sum of \$124.80, and that the same has been paid by the Plaintiff in Error.

Witness my hand and the seal of said Court this 17th day of September, 1921.

(SEAL)

W. D. McREYNOLDS, Clerk.



United States

Circuit Court of Appeals

For the Ninth Circuit.

G. H. ATKINS, CLIFTON H. KROLL, DAVID ATKINS and DAVID GOODALE,

Appellants,

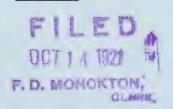
VS.

W. R. CARPENTER & CO., LTD., a Corporation, and WOLFF KIRCHMANN & CO., a Corporation,

Appellees.

Apostles on Appeal.

Upon Appeal from the Southern Division of the
United States District Court for the
Northern District of California,
First Division.





United States

Circuit Court of Appeals

For the Ninth Circuit.

G. H. ATKINS, CLIFTON H. KROLL, DAVID ATKINS and DAVID GOODALE,

Appellants,

VS.

W. R. CARPENTER & CO., LTD., a Corporation, and WOLFF KIRCHMANN & CO., a Corporation,

Appellees.

Apostles on Appeal.

Upon Appeal from the Southern Division of the
United States District Court for the
Northern District of California,
First Division.



INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Cierk's Note: When deemed likely to be of an important nature, arrors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Pa	ge
Affidavit of William Denman on Motion to	
Quash Foreign Attachment to Secure Juris-	
diction Over an Australian Corporation	41
Affidavit of Harold Maguire	45
Affidavit of A. E. Wolff	59
Amended Affidavit of Louis A. Ward	46
Amendment to Statement of Wolff, Kirchmann	
& Co., Inc	37
Assignment of Error	63
Certificate of Clerk U. S. District Court to	
Apostles on Appeal	66
Citation	28
EXHIBITS:	
Exhibit "A" Attached to Affidavit of	
William Denman—Letter Dated Feb-	
ruary 2, 1916, Signed J. B. Holohan	44
Libel	17
Motion on Special Appearance to Vacate At-	
tachment	55
Notice of Appeal	62
Notice of Motion on Special Appearance to	
Vacate Attachment	54

Index.	Page
Opinion and Order Granting Motion to Vacate	е
Service of Attachment Upon Garnishee-	-
American Trading Company	. 49
Order Granting Motion to Vacate Attachmen	
Re Wolff, Kirchmann & Co	
Praecipe for Apostles on Appeal	
Statement of Clerk U. S. District Court	
Statement of Wolff, Kirchmann & Co., Inc	. 35
Stipulation and Order Extending Time to and	1
Including September 10, 1921, to File	
Record and Docket Cause	. 69
Stipulation and Order Extending Time to and	1
Including October 10, 1921, to File Record	1
and Docket Cause	. 68
Stipulation in Regard to Appeal Bond, etc	. 65
Stipulation Re Apostles on Appeal	. 3
Stipulation Re Facts of American Trading	or 5
Company Garnishment	38
United States Marshal's Return of Service of	f
Citation, With Order for Foreign Attach-	-
ment	32
Writ of Foreign Attachment—Issued April 24	,
1919	30

In the Southern Division of the District Court of the United States for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,552.

G. H. ATKINS, CLIFTON H. KROLL, and DAVID ATKINS,

Libelants,

VS.

- W. R. CARPENTER & CO., LTD., a Corporation, Respondent.
- WOLFF, KIRCHMANN & CO., a Corporation, Garnishee.

Praecipe for Apostles on Appeal.

To the Clerk of the United States District Court for the Northern District of California:

Please prepare the apostles on appeal of the above-entitled action, to contain the following:

- 1. Statement.
- 2. Libel.
- 3. Citation in personam with return (issued Apr. 24, 1919).
- 4. Citation with clause of foreign attachment (issued April 24, 1919, filed Jan. 30, 1920).
- 5. Return of garnishee, Wolff, Kirchmann & Co., Inc., dated May 22, 1919; filed Jan. 30/20).
- 6. Amendment to statement of Wolff, Kirchmann & Co., Inc. (filed July 14/19).
- 7. Stipulation re facts of American Trading Company attachment.

- 8. Opinion and order granting motion to vacate American Trading Co. Attachment.
- 9. Notice of motion to vacate attachment (filed June 3, 1921). [1*]
- 10. Motion to vacate attachment (filed June 3, 1921).
- 11. Affidavit of Alfred E. Wolff (filed June 3, 1921).
- 12. Minute entry of order of July 2, 1921, granting motion to vacate attachment.
- 13. Notice of appeal (Wolff Kirchmann & Co., garnishee).
- 14. Assignment of errors (Wolff Kirchmann & Co., garnishee).
- 15. Stipulation re death of party.
- 16. Praecipe.

ANDROS & HENGSTLER, LEWIS T. HENGSTLER, F. W. DORR,

Proctors for Libelants. [2]

^{*}Page-number appearing at foot of page of original certified Apostles on Appeal.

In the Southern Division of the District Court of the United States for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,552.

G. H. ATKINS, CLIFTON H. KROLL, and DAVID ATKINS,

Libelants,

VS.

W. R. CARPENTER & CO., LTD., a Corporation, Respondent.

WOLFF, KIRCHMANN & CO., a Corporation, Garnishee.

Stipulation Re Apostles on Appeal.

IT IS HEREBY STIPULATED that the apostles on appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the order entered in the above-entitled action on July 2, 1921, vacating the attachment against Wolff Kirchmann & Co., a corporation, garnishee, may include the papers and records set forth in the praecipe attached hereto, and that all other papers and records in said action may be omitted from said apostles on appeal.

Dated: August 12, 1921.

ANDROS & HENGSTLER, LOUIS T. HENGSTLER, F. W. DORR,

Proctors for Libelants. WILLIAM DENMAN,

Proctors for Respondent and Garnishee.

[Endorsed]: Filed Aug. 12, 1921. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [3]

In the Southern Division of the District Court of the United States for the Northern District of California, First Division.

No. 16,552.

G. H. ATKINS, CLIFTON H. KROLL, DAVID ATKINS and DAVID GOODALE,

Libelants,

 ∇S .

W. R. CARPENTER & COMPANY, LTD., a Corporation,

Respondent.

Statement of Clerk U. S. District Court. PARTIES.

Libelants: G. H. ATKINS, CLIFTON H. KROLL, DAVID ATKINS and DAVID GOODALE. (David Goodale, deceased since filing of Libel.)

Respondent: W. R. CARPENTER & COMPANY, LTD., a Corporation.

Garnishees: WOLFF, KIRCHMANN & COM-PANY, a Corporation, and AMERICAN TRADING COMPANY, a Corporation. [4]

PROCTORS.

For Libelants: Messrs. ANDROS & HENGSTLER, LOUIS T. HENGSTLER, Esq., and F. W. DORR, Esq., San Francisco, Cal.

For Respondent and Garnishee, Wolff Kirchmann Co.: WILLIAM DENMAN, Esq., San Francisco, Cal.

For Garnishee, American Trading Company: SAM-UEL KNIGHT, Esq., and F. ELDRED BOLAND, Esq., San Francisco, Calif. PROCEEDINGS.

1919.

April 24. Filed libel for breach of contract with prayer for writ of foreign attachment and order allowing same.

Issued citation directed to respondent, which was afterwards filed on return, with the following return of U. S. Marshal endorsed thereon:

"I hereby certify and return, that on the 24th day of April, 1919, I received the attached Citation and that after diligent search, I am unable to find the within named respondent, W. R. Carpenter & Co., Ltd., a corporation, within my district.

J. B. HOLOHAN,
United States Marshal,
By Harold Maguire,
Deputy United States Marshal."
[5]

April 24. Issued citation and writ of foreign attachment, which was filed on re-

turn January 30, 1920, with the following returns of U. S. Marshal endorsed thereon:

"I hereby certify and return that I received the attached citation, with order for foreign attachment, at San Francisco, California, on April 24, 1919, and after due and diligent inquiry made, I am unable to find the respondent, W. R. Carpenter & Co., Ltd., a corporation, or any goods and chattels of said respondent, within my district.

I further return that at San Francisco within the said Northern District of California, on the 25th day of April, 1919, I attached all the credits and effects of W. R. Carpenter & Co., Ltd., a corporation, not to exceed the sum of \$94,360.00, due or owing to W. R. Carpenter & Co., Ltd., a corporation, in the hands or under the control of Wolff, Kirchmann & Co., a corporation, by handing to and leaving a copy of the attached citation and order for foreign attachment with Mr. A. E. Wolff, president of said corporation, personally, and admonishing him of the remedy demanded by said citation and order.

I further return that I cited and admonished said garnishee, Wolff, Kirchmann & Co., a corporation, named herein, to appear before the United States District Court at San Francisco, California, on the 6th day of May, 1919, at 10 o'clock A. M., of said day to make return of any credits and effects due the above-named respondent, and to do and abide by what may be required of them in this behalf.

J. B. HOLOHAN, U. S. Marshal. By Harold Maguire, Deputy.

San Francisco, California, April 25, 1919.''

and

"I hereby certify and return that I received the attached citation, with order for foreign attachment, at San Francisco, California, on April 24, 1919, and after due and diligent inquiry made, I am unable to find the chattels of said respondent, within my district.

I further return that at San Francisco within the said Northern District of California, on the 25th day of April, 1919, I attached all the credits and effects of W. R. Car-

penter & Co. Ltd., a corporation, not to exceed the sum [6] of \$94,360.00, due or owing to W. R. Carpenter & Co., Ltd., a corporation, in the hands or under the control of American Trading Company of 244 California Street, San Francisco, California, by handing to and leaving a copy of the attached citation and order for foreign attachment, with Louis A. Ward, manager of said corporation, who is the person designated by the said American Trading Company under the Statutes of the State of California, as the person upon whom all legal process shall be served in matters affecting the American Trading Company, personally, and admonishing him of the remedy demanded by said citation and order.

I further return that I cited and admonished said garnishee, American Trading Company, named herein, to appear before the United States District Court at San Francisco, California, on the 6th day of May, 1919, at 10 o'clock A. M., of said day to make return of any credits and effects due the abovenamed respondent, and to do and

abide by what may be required of them in this behalf.

> J. B. HOLOHAN, United States Marshal. By Harold Maguire, Deputy.

San Francisco, California, April 25, 1919."

1. Issued citation and writ of foreign attachment, which was filed on return January 30, 1920, with the following return of U. S. Marshal endorsed thereon:

"I hereby certify and return that I received the attached citation with order for Foreign Attachment, at San Francisco, California, on May 1, 1919, and after due and diligent inquiry made, I am unable to find the respondent, W. R. Carpenter & Co., Ltd., a corporation, or any goods and chattels of said Respondent, within my district.

I further return that at San Francisco within the said Northern District of California, on the 1st day of May, 1919, I attached all the credits and effects of W. R. Carpenter & Co., Ltd., a corporation, not to exceed the sum of \$94,360.00, due or owing to W. R. Carpenter & Co., Ltd., a corporation, in the

May

hands or under the control of American Trading Company of 244 California Street, San Francisco, California, [7] by handing to and leaving a copy of the attached citation and order for foreign attachment, with Louis A. Ward, manager of said corporation, who is the person designated by the said American Trading Company under the Statutes of the State of California, as the person upon whom all legal process shall be served in matters affecting the American Trading Company, personally, and admonishing him of the remedy demanded by said citation and order.

I further return that I cited and admonished said garnishee, American Trading Company, named herein, to appear before the United States District Court at San Francisco, California, on the 6th day of May, 1919, at 10 o'clock A. M., of said day to make return of any credits and effects due the abovenamed respondent, and to do and abide by what may be required of them in this behalf.

J. B. HOLOHAN, U. S. Marshal. By Harold Maguire, Deputy. San Francisco, California, May 1, 1919."

- May

 6. This cause was this day ordered referred to United States Commissioner for the purpose of taking and reporting the testimony upon the issues joined herein.
- July 14. Filed amendment to statement of Wolff, Kirchmann & Co., Inc. 1920.
- January 20. Filed notice to garnishee, Wolff, Kirchman & Co., of Motion for delivery of property, etc.
 - 30. Filed citation in *personam* on return.
 - Filed citation and writ of foreign attachment, issued April 24, 1919, on return.
 - Filed citation and writ of foreign attachment, issued May 1, 1919, on return.
 - Filed answer to Garnishment (American Trading Co.).
 - Filed statement of Wolff, Kirchmann & Co., dated May 22, 1919, re Garnishment. [8]
- January 31. Filed answer of garnishee, Wolff,
 Kirchmann & Co., to motion of
 libelants for order requiring
 them to deliver property or give
 stipulation.

Filed affidavit of William Denman.

July

- 1. Filed order that the commissioner report re credits and effects of respondent, in the hands of garnishee, American Trading Company.
- September 3. Filed report of U.S. Commissioner.
 - 4. On motion of libelants, it was this day ordered that the motion for delivery of shares be withdrawn.
 - 15. Filed libelants' exceptions to commissioner's report.
 - Filed exceptions to commissioner's report, by garnishee, American Trading Company.
 - 18. The exceptions to commissioner's report were this day argued before the Honorable M. T. Dooling, Judge, and ordered submitted.
 - 28. Filed motion of respondent (on special appearance) to vacate writs of foreign attachment (re American Trading Company).
- October
- 11. Filed notice of hearing above motion, with affidavit of Louis A. Ward attached.
- 30. The motion to vacate attachment was this day argued and submitted (Hon. M. T. Dooling, Judge).
- November 4. Filed petition and order permitting respondent to file affidavits in support of its motion to vacate attachment.

6. Filed petition and order permitting respondent to file additional affidavits in support of its motion to to vacate attachment. [9]

November 6. Filed affidavits of Harold Maguire and William Denman. Filed affidavit of Louis A. Ward.

1921.

May

27. Filed opinion and order granting motion to vacate service of attachments upon garnishee.

(Hon. M. T. Dooling, Judge).

June 2. Filed affidavit of Louis T. Hengstler in support of application for issuance of writ of foreign attachment.

Filed order allowing foreign attachment directed to Wolff, Kirchmann & Co., Garnishee.

Issued writ of foreign attachment directed to Wolff, Kirchmann & Co., Garnishee, which was filed on return July 13, 1921, with the following return endorsed thereon: "I hereby certify and return that I received the annexed citation with order for foreign attachment, at San Francisco, California, on the 2d day of June, 1921, and after due and diligent inquiry made, I am unable to find the respondent W. R. Carpenter & Co., Ltd., a corpora-

tion, or any goods and chattels of said corporation within my district.

I further return that on the 3d of June, 1921, I attached all of the shares of capital stock of Wolff, Kirchmann & Co., a corporation, owned by said respondent, also all goods, moneys, choses in action and credits and effects of said respondent in the hands of said Wolff, Kirchmann & Co., not to exceed in all the sum of \$94,360, by demanding from A. E. Wolff, the President of said corporation, on said date, at the office of said corporation in the City and County of San Francisco, California, the delivery to me of any and all of said property and effects, and by reading to said A. E. Wolff, the original citation and order for foreign attachment hereunto annexed, and by delivering to and leaving with said A. E. Wolff a true and correct copy of said citation and order for foreign attachment, together with a notice of the property attached. [10]

I further return that I cited and admonished the said garnishee, Wolff, Kirchmann & Co., a corporation, to appear before the Southern Division of the United States Dis-

trict Court, for the Northern District of California, First Division, at Postoffice Building, San Francisco, California, at 10 o'clock A. M., on the 14th day of June, 1921, to then and there answer on oath as to such property and credits in its hands belonging to said respondent, and to do and abide by what may be required of it in this behalf.

J. B. HOLOHAN, United States Marshal, By Thos. F. Mulhall, Deputy.

San Francisco, California, June 2d, 1921."

June

3. Filed motion of respondent to vacate attachment (Wolff, Kirchmann & Co.)

Filed notice of hearing above motion.

Filed affidavit of Alfred E. Wolff re motion to vacate attachment.

- 25. Filed answer of Garnishee, Wolff, Kirchmann & Co.
- July

 2. The Court this day ordered that the motion to vacate attachment be granted and that execution be stayed ten days (Hon. M. T. Dooling, Judge).

July 12. Filed notice of appeal (re order dated May 27, 1921).

Filed assignment of errors (re order dated May 27, 1921).

Filed notice of appeal (re order order dated July 2, 1921).

Filed assignment of errors (re order dated July 2, 1921).

- 13. Filed writ of foreign attachment on return.
- 22. Filed stipulation *re* appeal bond, and as to death of David Goodale, one of the libelants.

Filed bond on appeal.

August 12. Filed stipulation re facts of American Trading Company garnishment. [11]

In the Southern Division of the District Court of the United States, for the Northern District of California, First Division.

(IN ADMIRALTY.)

G. H. ATKINS, CLIFTON H. KROLL, DAVID ATKINS and DAVID GOODALE,

Libelants,

VS.

W. R. CARPENTER & CO., LTD., a Corporation, Respondent.

Libel.

To the Honorable MAURICE T. DOOLING,
Judge of said Court:

The libel of G. H. Atkins, Clifton H. Kroll, David Atkins and David Goodale, against W. R. Carpenter & Co., Ltd., in a cause of contract, civil and maritime, respectfully alleges:

FIRST CAUSE OF LIBEL.

I.

That at all the times herein mentioned said libelants, G. H. Atkins, Clifton H. Kroll, David Atkins and David Goodale, were and now are copartners doing a general shipping and commission business in the port of San Francisco, said Northern District of California, under the firm name and style of Atkins, Kroll & Co., being duly authorized thereunto by the laws of said State of California.

П.

That at all the times herein mentioned said respondent, W. R. Carpenter & Co., Limited, was, and now is, as libelant is informed and believes, a corporation organized and [12] existing under and by virtue of the laws of New South Wales, Australia, and residing and doing business as copra merchants in the city of Sydney, in said province of New South Wales.

III.

That during the latter months of the year 1917, and the early months of 1918, respondent repeatedly and urgently requested libelants to secure tonnage for respondent to enable the latter to export copra to the Pacific Coast of the United States, and to make to respondent, offers, from time to time, of the use of sailing vessels for said purpose, to be chartered by libelants for such use by respondent.

IV.

That in pursuance of said requests by respondent, and on or about the 10th day of April, 1918, libelant chartered from her owners, the Charles Nelson Company of San Francisco, the American Sailing Schooner "Minnie A. Caine," for a voyage from Sydney, N. S. W., to San Francisco, or Puget Sound port, agreeing to pay freight for the use of said schooner during said voyage at the rate of Forty Dollars (\$40) per 2,240 pounds delivered weight, less five (5) per cent. That said schooner, on the said 10th day of April, 1918, was at Adelaide, Australia, whence she was to proceed, direct or via Sydney, to a Pacific Coast port, whence she was to proceed to load lumber for Australia, whence she was to proceed to load a cargo of copra at Sydney under the said charter. That the estimated carrying capacity of said schooner for the carriage of copra in bulk is eight hundred and fifty (850) long tons, being tons of 2,240 lbs. each. [13]

V.

That on or about the 19th day of August, 1918, libelants, by letter, offered to respondent the use of the said schooner "Minnie A. Caine," under said charter for the freighting and transportation of a full cargo of copra from Sydney to San Francisco, at

the rate of Forty Dollars (\$40) per 2,240 pounds. That on or about the 11th day of September, 1918, respondent, by cable, accepted the terms of the offer made by libelants, as aforesaid and, by letter of the same date, addressed to libelants, respondent expressly confirmed the freighting contract so made, in consideration of the payment, by respondent to libelant, of freight at the rate of Forty Dollars (\$40) net per 2,240 pounds delivered, and in further consideration of respondent conferring upon libelants the right to sell the cargo of copra to be sent to San Francisco by said vessel for respondent, and to receive therefor a commission of one and one-half per cent (1½) of the sale price.

VI.

That thereafter, and in pursuit of the voyage on which said schooner was engaged by respondent, she arrived at the port of Sydney.

That before the arrival of said schooner "Minnie A. Caine" at the port of Sydney, charter rates had fallen in the freighting market. That on or about the 9th day of March, 1919, libelants duly tendered the said schooner to said respondent, said schooner being then and there at the port of Sydney and in all respects seaworthy and ready to load. That respondent thereupon refused to load the said schooner, and on or about the 25th day of March, 1919, upon expiration of the laydays provided in the charterparty, respondent notified libelants by cable that [14] it would not furnish the cargo for the schooner and repudiated the contract above mentioned.

VII.

That libelants have, at all times mentioned, duly performed all the obligations, terms and conditions of the contract made between them and respondents as above stated.

VIII.

That the damages caused to libelant by the said breach of contract by respondent amount to the sum of Twenty-nine Thousand Seven Hundred and Fifty Dollars (\$29,750.)

IX.

That all and singular the premises are true, and within the admiralty and maritime jurisdiction of this Honorable Court.

SECOND CAUSE OF LIBEL.

T.

For a second cause of libel, libelant alleges:

T.

That at all the times herein mentioned said libelants, G. H. Atkins, Clifton H. Kroll, David Atkins and David Goodale, were and now are copartners doing a general shipping and commission business in the port of San Francisco, said Northern District of California, under the firm name and style of Atkins, Kroll & Co., being duly authorized thereunto by the laws of said State of California.

II.

That at all the times herein mentioned said respondent, W. R. Carpenter & Co., Limited, was, and now is, as libelant is informed and believes, a corporation organized and existing under and by vir-

tue of the laws of New South Wales, Australia, and doing business as copra merchants in the city of Sydney, in said [15] province of New South Wales.

III.

That during the latter months of the year 1917, and the early months of 1918, respondent repeatedly and urgently requested libelants to secure tonnage for respondent to enable the latter to export copra to the Pacific Coast of the United States, and to make to respondent offers, from time to time, of the use of sailing vessels for said purpose, to be chartered by libelants for such use by respondent.

IV.

That, in pursuance of said requests by respondent, and on or about the 29th day of April, 1918, libelant chartered from her owners, the Charles Nelson Company of San Francisco the American sailing schooner "Minnie A. Caine" for a voyage from Sydney, N. S. W., or Levuka, to San Francisco, agreeing to pay freight for the use of said schooner during said voyage at the rate of Forty Dollars (\$40) per 2,240 lbs. delivered weight, less five (5) per cent, if she loaded at Sydney, N. S. W., and at the rate of \$42.50 per 2,240 pounds delivered, less 5%, if she loaded at Levuka, Fiji Islands. That in and by said charterparty, it was agreed that said schooner should, after performing her voyage under the charter in article IV of the "First Cause of Action" hereinabove described, load and carry a cargo of lumber for Australia and thereupon, upon her return voyage to San Francisco, load under said charter a full and complete cargo of copra, in bulk, for San Francisco or Puget Sound port. That the estimated carrying capacity of said schooner for the carriage of copra in bulk is eight hundred and fifty (850) long tons, being tons of 2,240 lbs. each. [16]

V.

That thereafter, respondent entered into a freighting contract with libelants, whereby respondent agreed with libelants to use said schooner on the charter voyage from Australia or Levuka to San Francisco, in Article IV described, and to load the said schooner with a full cargo of copra after her eventual arrival at Sydney and readiness for said voyage, and agreed to pay to libelants for said use of said schooner at the rate of Forty Dollars (\$40) net per long ton, if respondent should elect to load said schooner at Sydney, and at the rate of Forty-five Dollars (\$45) net per 2,240 lbs., if respondent should elect to load said schooner at Levuka. And respondent further agreed by the said contract to confer upon libelants the right to sell the cargo of copra to be sent to San Francisco by said vessel for respondent, and to pay to libelants a commission of one and one-half (1½) per cent for such service.

VI.

That thereafter charter rates fell in the freighting market and thereupon, and on or about the 25th day March, 1919, respondent notified libelants by letter that respondent then and there refused and would thereafter refuse, to recognize or to be further bound by, or to perform, the contract heretobefore

made and in Article V referred to. That, at the time of said notice received by libelants, the said schooner was lying at Sydney, waiting for cargo after respondent had breached the first charter, in Article V of the "First Cause of Action" hereinabove referred to.

VII.

That libelants have, at all the times herein mentioned, been ready and willing to perform and have duly performed, [17] all obligations, terms and conditions of the contract, on their part to be performed.

VIII.

That the damage caused to libelants by the said anticipatory breach of contract by respondent cannot, at the time of the filing of this libel, be ascertained with any degree of accuracy, and therefore libelants pray for leave of the Court to insert the same in this libel as they may hereafter be found; but libelants anticipate that said damages, at a fair estimate, will amount to no less than the sum of Thirty-seven Thousand Four Hundred and Eighty-five Dollars (\$37,485).

IX.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

THIRD CAUSE OF LIBEL.

I.

That at all the times herein mentioned said libelants, G. H. Atkins, Clifton H. Kroll, David Atkins

and David Goodale, were and now are copartners doing a general shipping and commission business in the port of San Francisco, said Northern District of California, under the firm name and style of Atkins, Kroll & Co., being duly authorized thereunto by the laws of said State of California.

II.

That at all the times herein mentioned said respondent, W. R. Carpenter & Co., Limited, was, and now is, as libelant is informed and believes, a corporation organized and existing under and by virtue of the laws of New South Wales, Australia, and [18] doing business as copra merchants in the city of Sydney, in said province of New South Wales.

III.

That during the latter months of the year 1917, and the early months of 1918, respondent repeatedly and urgently requested libelants to secure tonnage for respondent to enable the latter to export copra to the Pacific Coast of the United States, and to make to respondent offers, from time to time, of the use of sailing vessels for said purpose, to be chartered by libelants for such use by respondent.

IV.

That, in pursuance of said requests by respondent, and on or about the 10th day of April, 1918, libelants chartered from her owners, the Charles Nelson Company of San Francisco, the American sailing schooner "Taurus" for a voyage from Sydney N. S. W., or Apia, or Levuka, or Papeete, to San Francisco, agreeing to pay freight for the use of said Vessel,

during said voyage, at the rate of Forty Dollars (\$40) per 2,240 lbs. delivered weight, less five (5) per cent, if said schooner loaded at Sydney, and at the rate of Forty-five Dollars (\$45) per 2,240 lbs. delivered weight, less five (5) per cent, if she loaded either at Apia, or Levuka, or Papeete. At the time of the making of said charter-party, the said vessel was on passage to the Pacific Coast, whence she was to proceed to Australia, whence she was to proceed to a copra port under a previous charter and fulfil said charter; then she was to proceed to load lumber for Australia, whence she was to proceed to load a cargo of copra in bulk under the charter herein men-That the estimated carrying capacity of said schooner for the carriage of copra in bulk is 625 long tons, being tons of 2,240 pounds each. [19]

V.

That thereafter, respondent entered into a freighting contract with libelants, whereby respondent agreed to use said schooner on charter voyages in Article IV described and to load the said schooner with a full cargo of copra after her eventual arrival at the loading port designated by respondent, and her readiness for the charter-voyage, and to pay to libelants for the use of said schooner at the rate of Forty Dollars (\$40) net per 2,240 lbs. delivered weight, if respondent should elect to load said schooner at Sydney, and at the rate of Forty-five Dollars (\$45) net per 2,240 lbs. delivered weight, if respondent should elect to load said schooner at Levuka, Fiji Islands. And respondent further agreed

by the said contract to confer upon libelants the right to sell the cargo of copra to be sent to San Francisco by said vessel of respondent, and to pay to libelants a commission of one and one-half (1½) per cent for such service.

VI.

That thereafter charter rates fell in the freighting market, and thereupon and on or about the 25th day of March, 1919, respondent notified libelants by letter that respondent then and there refused, and would thereafter refuse, to recognize or to be further bound by, or to perform, the contract heretofore made and in Artticle V, referred to. That, at the time of said notice given to libelants, the said schooner was engaged in a voyage precedent to the charter voyage on which respondent had contracted to use her as hereinabove described.

VII.

That libelants have, at all times herein mentioned, been ready and willing to perform, and have duly performed, all the obligations, terms and conditions of the contract, on their part to be performed. [20]

VIII.

That the damages caused to libelants by the said anticipatory breach of contract by respondent cannot, at the time of the filing of this libel, be ascertained with any degree of accuracy, and therefore libelants pray for leave of the Court to insert the same in this libel as they may hereafter be found; but libelants anticipate that said damages will, at a fair estimate, amount to no less than the sum of

Twenty-seven Thousand One Hundred and Twenty-five Dollars (\$27,125).

WHEREFORE libelants pray:

That a monition, according to the practice of this Honorable Court, may issue against the respondent, W. R. Carpenter and Co., Ltd., citing it to appear and answer on oath the matters aforesaid, and that, in case respondent cannot be found, then that its goods and chattels be atttached to the amount sued for; and that, if sufficient goods and chattels cannot be found, its credits and effects be attached in the hands of American Trading Company, and of Wolff Kirchmann & Co., garnishees, and of any other garnishees having credits and effects of said respondent in hands; and that the said garnishees may be cited to appear and answer on oath as to credits and effects in their hands and belonging to said respondent; and that this Honorable Court would be pleased to decree to the libelants, the payment of the damages sustained by said libelants, in the sum of \$94,-360, or such other sum as libelants may be entitled to recover, with costs, and that libelants may have such other and further relief in the premises as in law and justice they may be entitled to receive.

ANDROS & HENGSTLER,

Proctors for Libelants. [21]

State of California,

City and County of San Francisco,—ss.

G. H. Atkins, being duly sworn, deposes and says: I am one of the libelants in the foregoing libel mentioned and a member of the copartnership of Atkins Kroll & Co. I have read the foregoing libel and know the contents thereof, and the same is true, except as to matters therein alleged on information and belief, and as to such matters I believe it to be true.

G. H. ATKINS.

Subscribed and sworn to before me this 21st day of April, 1919.

[Seal]

JOHN E. MANDERS,

Notary Public, in and for the City and County of San Francisco, State of California.

Let process issue as prayed for.

W. H. HUNT, Judge of Said Court.

[Endorsed]: Filed April 24, 1919. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [22]

Citation.

Northern District of California,—ss.

The President of the United States of America, To the Marshal of the United States for the Northern District of California, GREETING:

WHEREAS, a libel has been filed in the District Court of the United States for the Northern District of California, First Division, on the 24th day of April, in the year of our Lord, one thousand nine hundred and nineteen, By G. H. Atkins, Clifton H. Kroll, David Atkins and David Goodale, Libelants; vs. W. R. Carpenter & Co., Ltd., a corporation, in a certain action for damages, civil and maritime, to re-

cover the sum of \$94,360.00 (as by said libel, reference being hereby made thereto, will more fully and at large appear), therein alleged to be due the said libelant, and praying that a citation may issue against the said respondent, pursuant to the rules and practice of this Court.

Now, therefore, we do hereby empower and strictly charge and command you, the said marshal, that you cite and admonish the said respondent, if it shall be found in your District, that it be and appear before the said District Court, on Tuesday, the 6th day of May, A. D. 1919, at 10 o'clock in the forenoon at the Courtroom in the city of San Francisco, then and there to answer the said libel, and to make its allegations in that behalf: and have you then and there this writ, with your return thereon.

WITNESS, The Honorable M. T. DOOLING, Judge of said Court, the 24th day of April in the year of our Lord, one thousand nine hundred and nine-teen.

[Seal]

WALTER B. MALING,

Clerk.

By C. W. Calbreath,

Deputy Clerk.

ANDROS & HENGSTLER,

Proctor for Libelant.

[Endorsed]: Filed Jan. 30, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [23] Northern District of California,—ss.

I hereby certify and return, that on the 24th day of April, 1919, I received the attached citation and that

after diligent search, I am unable to find the within named respondent, W. R. Carpenter & Co., Ltd., a corporation, within my district.

J. B. HOLOHAN,
United States Marshal.
By Harold Maguire,
Deputy United States Marshal. [24]

ORIGINAL.

In the Southern Division of the District Court of the United States, for the Northern District of California, First Division.

IN ADMIRALTY.

G. H. ATKINS, CLIFTON H. KROLL, DAVID ATKINS and DAVID GOODALE,

Libelants,

VS.

W. R. CARPENTER & CO., LTD., a Corporation, Respondent.

Writ of Foreign Attachment—Issued April 24, 1919.

The President of the United States of America to the Marshal of the Northern District of California, GREETING:

Whereas, a libel has been filed in the District Court of the United States of America for the First Division of the Northern District of California, on the 24th day of April, in the year 1919, by G. H. Atkins, et als., libelants, against W. R. Carpenter & Co., Ltd., in a certain cause, civil and maritime, for breach of contract of affreightment, wherein libelants

allege damages amounting to the sum of ninety-four thousand three hundred and sixty dollars (\$94,360.), and prays that a monition may issue against the said respondent, pursuant to the practice of this court, and that its goods and chattels and its credits and effects may be attached to compel the attendance of respondent in case it cannot be found;

Now, therefore, [25] we do hereby empower, and strictly charge and command you, the said marshal, that you warn the said respondent, if it shall be found in your district, to be before the said District Court of the United States, at the United States Postoffice Building, in the City and County of San Francisco, on the 6th day of May, 1919, at 10 o'clock A.M., then and there to answer the said libel, and to make its allegations in that behalf; and if the said respondent cannot be found in your district, we further command you that you attach its goods and chattels in your district to the amount sued for, and if no goods and chattels can be found, that you attach his credits and effects to the amount sued for, in the hands of American Trading Company, and of Wolff Kirchman & Co., garnishees, and of any other garnishees having credits and effects of said respondent in hand: and that you summon the said garnishees to appear before the said District Court on the said 6th day of May, 1919, to do and abide what may be required of them in this behalf; and have you then and there this writ, with your return thereon.

WITNESS the Honorable M. T. DOOLING, Judge of said court, this 24th day of April, in the year of our Lord 1919.

[Seal]

W. B. MALING,
Clerk of Said Court.
By C. W. Calbreath,
Deputy.

ANDROS & HENGSTLER,
Proctors for Libelants.

[Endorsed]: Filed Jan. 30, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [26]

United States of America, Northern District of California, Southern Division, City and County of San Francisco,—ss.

United States Marshal's Return of Service of Citation, with Order for Foreign Attachment.

I HEREBY CERTIFY AND RETURN that I received the attached citation with order for foreign attachment, at San Francisco, California, on April 24, 1919, and after due and diligent inquiry made, I am unable to find the respondent, W. R. Carpenter & Co., Ltd., a corporation, or any goods and chattels of said respondent, within my district.

I FURTHER RETURN that at San Francisco within the said Northern District of California, on the 25th day of April, 1919, I attached all the credits and effects of W. R. Carpenter & Co., Ltd., a corporation, not to exceed the sum of \$94,360, due or owing to W. R. Carpenter & Co., Ltd., a corporation, in the hands or under the control of Wolff, Kirchmann &

Co., a corporation, by handing to and leaving a copy of the attached citation and order for foreign attachment with Mr. A. E. Wolff, president of said corporation, personally, and admonishing him of the remedy demanded by said citation and order.

I FURTHER RETURN that I cited and admonished said Garnishee, Wolff, Kirchmann & Co., a corporation, named herein, to appear before the United States District Court at San Francisco, California, on the 6th day of May, 1919, at 10 o'clock A. M., of said day to make return of any credits and effects due the above-named respondent, and to do and abide by what may be required of them in this behalf.

J. B. HOLOHAN, U. S. Marshal. By Harold Maguire, Deputy.

San Francisco, California, April 25, 1919. [27]

United States of America, Northern District of California, Southern Division, City and County of San Francisco,—ss.

United States Marshal's Return of Service of Citation, with Order for Foreign Attachment.

I HEREBY CERTIFY AND RETURN that I received the attached citation with order for foreign attachment, at San Francisco, California, on April 24, 1919, and after due and diligent inquiry made, I am unable to find the respondent, W. R. Carpenter

& Co., Ltd., a corporation, or any goods and chattels of said respondent, within my district.

I FURTHER RETURN that at San Francisco within the said Northern District of California, on the 25th day of April, 1919, I attached all the credits and effects of W. R. Carpenter & Co., Ltd., a corporation, not to exceed the sum of \$94,360, due or owing to W. R. Carpenter & Co., Ltd., a corporation, in the hands or under the control of American Trading Company of 244 California Street, San Francisco, California, by handing to and leaving a copy of the attached citation and order for foreign attachment, with Louis A. Ward, manager of said corporation, who is the person designated by the said American Trading Company under the Statutes of the State of California, as the person upon whom all legal process shall be served in matters affecting the American Trading Company, personally, and admonishing him of the remedy demanded by said citation and order.

I FURTHER RETURN that I cited and admonished said Garnishee, American Trading Company, named herein, to appear before the United States District Court at San Francisco, California, on the 6th day of May, 1919, at 10 o'clock A. M., of said day to make return of any credits and effects due the above-named respondent, and to do and abide by what may be required of them in this behalf.

J. B. HOLOHAN, United States Marshal. By Harold Maguire, Deputy.

San Francisco, California, April 25, 1919. [28]

In the Southern Division of the District Court of the United States in and for the Northern District of California, First Division.

IN ADMIRALTY.

G. H. ATKINS, CLIFTON H. KROLL, DAVID ATKINS and DAVID GOODALE,

Libelants,

VS.

W. R. CARPENTER & CO., LTD., a Corporation, Respondent.

Statement of Wolff, Kirchmann & Co., Inc.

To The Honorable, the Judge of the United States District Court, for the Northern District of California:

Wolff, Kirchmann & Co., Inc., respectfully represent:

I.

That at the date the United States Marshal handed it a copy of the writ herein, it had no goods and chattels or credits and effects belonging to said W. R. Carpenter & Co., Ltd., a corporation, respondent in the above-entitled action, nor has it since had any; that said W. R. Carpenter & Co., Ltd., a corporation, owns 300 shares of stock of said Wolff, Kirchmann & Co. Inc., of a par value of \$100 each; that said shares of stock are fully paid up.

Dated, May 22, 1919.

WOLFF, KIRCHMANN & CO., INC.

By ALFRED E. WOLFF,

President.

WILLIAM DENMAN.

Proctor for Wolff, Kirchmann & Co. Inc. [29]

State of California, City and County of San Francisco,—ss.

Alfred E. Wolff, being first duly sworn, deposes and says that he is an officer of said Wolff, Kirchmann and Co., Inc., to wit, president thereof, and as such is authorized to make this verification in its behalf; that he has read the foregoing return and knows the contents thereof; that the same is true according to his best knowledge and belief.

ALFRED E. WOLFF.

Subscribed and sworn to before me this 20th day of May, 1919.

[Seal] KATHRYN E. STONE,

Notary Public in and for the City and County of San Francisco, State of California.

Receipt of a copy of the within Statement, etc., is hereby admitted this 22d day of May, 1919.

ANDROS & HENGSTLER, Attorneys for Libelant.

[Endorsed]: Filed Jan. 30, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [30] In the Southern Division of the District Court of the United States in and for the Northern District of California, First Division.

IN ADMIRALTY.

C. H. ATKINS, CLIFTON H. KROLL, DAVID ATKINS and DAVID GOODALE,

Libelants,

VS.

W. R. CARPENTER AND CO., LTD., a Corporation,

Respondent.

Amendment to Statement of Wolff, Kirchmann & Co., Inc.

To the Honorable, the Judges of the United States
District Court, for the Northern District of
California:

Wolff, Kirchmann and Co., Inc., respectfully beg to amend their statement heretofore filed herein by adding to paragraph I thereof the following sentence:

"That at the time of the receipt of said copy of said writ the said W. R. Carpenter and Co., Ltd., appeared in the books and records of the said Wolff, Kirchmann and Co., Inc., as the owner of said 300 shares of stock."

Dated: July 10th, 1919.

WOLFF, KIRCHMANN AND CO., INC., By ALFRED E. WOLFF,

President.

WILLIAM DENMAN,

Proctor for Wolff, Kirchman and Co., Inc.

Due service and receipt of a copy of the within amendment to statement of Wolff, Kirchmann & Co., Inc., is hereby admitted this 11th day of July, 1919.

ANDROS & HENGSTLER,

Attorneys for Libellants.

[Endorsed]: Filed July 14, 1919. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [31]

In the Southern Division of the District Court of the United States for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,552.

G. H. ATKINS, CLIFTON H. KROLL and DAVID ATKINS,

Libelants,

VS.

W. R. CARPENTER AND CO., LTD., a Corporation,

Respondent.

WOLFF, KIRCHMANN & CO., a Corporation, Garnishee.

Stipulation Re Facts of American Trading Company Garnishment.

IT IS HEREBY STIPULATED that the facts relating to the attachment herein against the American Trading Company, a corporation, garnishee, and the motion to vacate said attachment, are as follows:

On April 25th, 1919, the process in foreign attachment which was issued in this action on April 24th, 1919, was served upon the said American Trading Company, garnishee. A second citation and writ of foreign attachment was issued on May 2d, 1919, and was served upon the American Trading Company, as garnishee. The garnishee filed an answer setting forth the debits and credits existing between itself and the respondent above named, and the matter was referred to a commissioner for the purpose of taking testimony and reporting to the Court what credits and effects were in the hands of the garnishee when the writ was served. The commissioner took testimony from time to [32] time and on March 27th, 1920, the matter was finally submitted to him for decision and on September 10, 1920, his report was filed. The commissioner found that at the time when the first writ of attachment was served on the American Trading Company, there were in its hands credits of the respondent amounting to \$6,948.11. Exceptions were filed to the report of the commissioner, and on September 18, 1920, were argued and submitted to the Court for decision.

On October 11, 1920, the respondent W. R. Carpenter & Co., Ltd., appeared specially, and moved to vacate the attachments against the American Trading Company, alleging 13 grounds why the attachment should be vacated, the first 12 of said grounds being identical with the first 12 grounds in its later motion to vacate the attachment against Wolff

Kirchmann & Co., the thirteenth ground of said motion being as follows:

"13. That no order for the monition and process of May 1st, 1919, was ever made by this Court."

In support of its motion to vacate the American Trading Company attachments, the respondent filed the affidavits of William Denman, Harold Maguire and Louis A. Ward, copies of which affidavits are hereunto attached and by reference made a part hereof.

The motion was submitted to the Court upon briefs filed by both libelants and respondent, and on May 27th, 1921, an opinion was rendered and an order entered granting respondent's motion to vacate the American Trading Company attachments. A copy of the opinion is included in the apostles on appeal. Respondent thereafter moved to vacate the Wolff, Kirchmann & Co. attachment on substantially the same grounds which had been urged against the American Trading Company attachments, and the Court followed its [33] previous ruling and entered a minute order on July 2d, 1921, vacating the Wolff Kirchmann & Co. attachment.

Dated: August 12, 1921.

ANDROS & HENGSTLER, LOUIS T. HENGSTLER, F. W. DORR,

Proctors for Libelants.

WILLIAM DENMAN,
Proctors for Respondent. [34]

In the Southern Division of the District Court of the United States in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,552.

C. H. ATKINS, CLIFTON H. KROLL, DAVID ATKINS and DAVID GOODALE,

Libelants,

VS.

W. R. CARPENTER AND CO., LTD., a Corporation,

Respondent.

Affidavit of William Denman on Motion to Quash Foreign Attachment to Secure Jurisdiction Over an Australian Corporation.

RELATIVE TO PRACTICE ON ATTACH-MENTS, AND MR. MAGUIRE'S AFFI-DAVIT.

State of California,

City and County of San Francisco,—ss.

William Denman, being first duly sworn, deposes and says:

That at the time of the attempted service of the two writs of attachment herein it was the practice, in accordance with the District Court Rules in Admiralty, and particularly Rule 11, and at all times had been the practice under such rules, in attempting to attach or garnishee credits of a foreign respondent to serve upon the garnishee a notice of the property garnished in the hands of the garnishee,

together with the writ authorizing the marshal to make such attachment, which said notice is in the form set forth in Exhibit "A" hereunto annexed and hereby made a part hereof.

That at the time of said two attempted attachments or garnishments of credits of the respondent in the hands of the [35] American Trading Company, the deputy marshal, Mr. Maguire, had never made such service, and did so in the absence of Mr. Burnham, chief deputy in charge of such services of the United States marshal's office in this District; that he was unfamiliar with the methods of said service, and did fail to serve any notice whatsoever of the credits attached at the time he handed to the representative of the American Trading Company the writ returned herein; that he was so unfamiliar with the acts constituting a proper service that he did not know how to make a return upon the writ; that on account of the absence of Mr. Burnham from the office, he delayed making his return for many months awaiting his advice as to the method of making the return; that the return in question was finally drafted, but antedated to the date of the attempted attachments; that the return was actually made by filing the writ with the clerk of the said Court on or about the last of December, 1919, that is, over seven months after the time of the acts recited in the return.

That your affiant was unaware of the delay in making and filing the return until within five days last past, until which time he assumed that the Marshal had filed his return on the return day of such

writs, to wit, the 6th, day of May, 1920. This delay made more significant to your affiant the affidavit of Mr. Maguire hereunto annexed.

WILLIAM DENMAN.

Subscribed and sworn to before me, this 4th day of November, 1920.

[Seal] MURIEL ATHERTON RUSSELL, Notary Public, in and for the City and County of San Francisco, State of California. [36]

Exhibit "A."

United States of America, Northern District of California,—ss.

No. 15,968.

THE CHARLES NELSON COMPANY, a Corp., Libelant,

 ∇S .

THE LLOYD MEXICANO, S. A., a Corp., and F. JEBSEN,

Respondents.

United States Marshal's Office, San Francisco, California, February 2, 1916.

You will please take notice that all moneys, goods, credits and effects to the amount sued for herein, to wit, the sum of nine hundred fifty and 50/100 (\$950-50) Dollars, debts due nor owing to Lloyd Mexicano, S. A., a corporation, and F. Jebsen, or belonging or owing to them or either of them, or any other personal property in your possession or under your control belonging to the said Lloyd Mexicano, S. A., a corporation, and F. Jebsen, or either of them, the

respondents named in the writ of attachment, of which the annexed is a copy, are attached by virtue of the said writ, and you are hereby notified not to pay over or transfer the same to anyone but myself.

Please furnish me with a statement thereof.

You are further notified and summoned to appear before the United States District Court, in and for the Northern District of California, in the Postoffice Building, corner of Seventh and Mission Streets, of the City and County of San Francisco, California, on February, 1916, at the hour of ten o'clock A. M., to answer on oath as to the credits and effects of the respondent herein in your hands, as prayed for in the libel on file herein, to do and abide by what may be required of you in this behalf.

Yours respectfully, J. B. HOLOHAN, U. S. Marshal,

Exhibit "A" [37]

In the Southern Division of the District Court of the United States in and for the Northern District of California, First Division.

IN ADMIRALTY.

G. H. ATKINS, CLIFTON H. KROLL, DAVID ATKINS and DAVID GOODALE,

Libelants,

VS.

W. R. CARPENTER AND CO., LTD., a Corporation,

Respondent.

Affidavit of Harold Maguire.

In the Northern District of California, United States of America,—ss.

Harold Maguire, being first duly sworn, deposes and says that he is a deputy United States marshal in and for the said District, that he delivered the two writs of foreign attachment, upon which he has heretofore made return in this cause to the American Trading Company, a corporation, in the following manner, to wit:

Between the hours of nine (9) and ten (10) A. M. on the twenty-fifth day (25) of April, 1919, he called at the office of the American Trading Company in the city and county of San Francisco, and inquired for Mr. Louis A. Ward, representative of the said company, entitled to accept service of process. He was presented to Mr. Ward and told him that he (affiant) was such deputy marshal, and asked him whether or not he was an agent of the American Trading Company to accept such process. Mr. Ward replied that he was. Affiant thereupon handed to Mr. Ward the copy of the writ of attachment upon which he has made return herein. [38]

Mr. Ward did not decline to deliver up the credits named in the writ, nor did he deny the same to be the property of the defendant. Nothing was said about the credits to my present knowledge.

On or about the first day of May, 1919, affiant again called upon Mr. Ward at the offices of the American Trading Company, and delivered to him a second

copy of the process upon which affiant has made return herein. The same occurrences transpired. There was no discussion of any kind concerning the credits. Mr. Ward took the copy, affiant did not request Mr. Ward to deliver up the credits to him, Mr. Ward did not deny them to be the property of the defendant and neither asked any questions nor said anything about the credits.

HAROLD MAGUIRE.

Subscribed and sworn to this 25th day of September, 1920.

[Seal]

C. W. CALBREATH,

Deputy Clerk, U. S. District Court. [39]

In the Southern Division of the District Court of the United States in and for the Northern District of California, First Division.

IN ADMIRALTY.

G. H. ATKINS, CLIFTON H. KROLL, DAVID ATKINS and DAVID GOODALE,

Libelants,

VS.

W. R. CARPENTER AND CO., LTD., a Corporation,

Respondent.

Amended Affidavit of Louis A. Ward.

State of California,

City and County of San Francisco,—ss.

Louis A. Ward, being first duly sworn, deposes and says: That he is the representative of the Ameri-

can Trading Company authorized to accept service of process, and was in the months of April and May, That on or about the 25th day of April, 1919, a young gentleman, whom he now understands to be Mr. Maguire, a deputy United States marshal, was presented to him in the office of the American Trading Company as a deputy United States marshal. Mr. Maguire asked affiant whether he was authorized to accept process for the American Trading Company, and affiant answered that he was authorized to accept such process. Mr. Maguire then handed him a copy of the writ of attachment addressed to the marshal, and retired, before affiant had any opportunity to read the document. There was no discussion of any kind between affiant and Mr. Maguire as to the property attempted to be attached by the service of the document, nor was there, as your affiant now recollects, any discussion of the contents of the document. Affiant was at no time requested to surrender or pay to Mr. Maguire, as deputy marshal, or otherwise, any credits which he might have had belonging to respondent in this case. Affiant did not decline [40] to deliver up to the marshal any property, effects or credits named in the said document, or at all. He was not given any opportunity to do this, nor was he at any time advised that he was entitled to or expected to deliver up or pay over to the marshal any property, effects or credits of any kind.

On or about May 1st, 1919, Mr. Maguire again called upon affiant at the office of the American Trad-

ing Company and handed to him a second document purporting to be a copy of a writ of attachment addressed to the marshal. There was no discussion of the contents of the writ, and no request that there be paid over or delivered up to Mr. Maguire, as such deputy marshal, any property, effects or credits belonging to the respondent. Mr. Maguire left immediately after he handed to affiant this second copy of the writ of attachment. No documents (other than the two writs of attachment) of any other kind were served or handed by Mr. Maguire on either occasion, or at any time.

LOUIS A. WARD.

Subscribed and sworn to before me, this 5th day of November, 1920.

[Seal] MURIEL ATHERTON RUSSELL,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Aug. 12, 1921. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [41]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,552.

G. H. ATKINS, CLIFTON H. KROLL, DAVID ATKINS and DAVID GOODALE.

Libelants,

VS.

W. R. CARPENTER AND CO., LTD., a Corporation,

Respondent.

Opinion and Order Granting Motion to Vacate Service of Attachment Upon Garnishee—American Trading Company.

ANDROS & HENGSTLER, Proctors for Libelants.

SAMUEL KNIGHT, Esq., and F. E. BOLAND, Attorneys for American Trading Company.

WILLIAM DENMAN, Esq., Proctor for Respondent, W. R. CARPENTER & CO., LTD., appearing specially to vacate attachments.

Upon the filing of the libel herein, libelant secured an order from the Court for the issuance of a "monition against respondent citing it to appear and answer, and in case respondent cannot be found that its goods and chattels be attached to the amount sued for; and if sufficient goods and chattels cannot be found, that its credits and effects be attached in the hands of American Trading Company, and of Wolff, Kirchman & Co., garnishees, and of any other garnishees having credits and effects of said respondent in hands; and that said garnishees may be cited to appear and answer on oath as to credits and effects in their hands and belonging to respondent." This was the prayer of the libel, and the order of the Court was in the following form: "Let process issue as prayed for."

The respondent is a foreign corporation and could not be found in this District. [42]

The process issued in accordance with this order was directed to the marshal and contained the following, after preliminary recitals, "Now, therefore, we do hereby empower, and strictly charge and command you, the said marshal, that you warn the said respondent, if it shall be found in your district, to be before the said District Court of the United States, at the United States Postoffice Building, in the city and county of San Francisco, on the 6th day of May, 1919, at 10 o'clock A. M., then and there to answer the said libel, and to make its allegations in that behalf; and if the said respondent cannot be found in your district, we further command you that you attach its goods and chattels in your district to the amount sued for, and if no goods and chattels can be found, that you attach his credits and effects to the amount sued for, in the hands of American Trading Company, and of Wolff, Kirchman & Co., garnishees, and of any other garnishees having credits and effects of said respondent in hand; and that you summon the said garnishees to appear before the said District Court on the said 6th day of May, 1919, to do and abide what may be required of them in this behalf; and have you then and there this writ, with your return thereon."

The respondent not being found in the District, nor any of its goods or chattels, a copy of this process was delivered to American Trading Co. and to Wolff, Kirchman & Co. named therein as garnishees, but no notice of the property attached was given them nor was any mention of such property made, nor were the effects and credits delivered to the marshal by the garnishee. The only service of the attachment was by the delivery of the copy of the pro-

cess. This was on April 25th, 1919. A second process without further order of the Court was later issued, which was in [43] the same form and served in the same way on May 1st. The garnishees answered as required, and it is contended by them that they had no credits or effects of respondent, and by libelant that they had.

Respondent, however, appearing specially for that purpose, moves to vacate the attachments on a number of grounds. The gravest one in my opinion is based on the fact that the only service on the garnishees was by leaving a copy of the process with them. The manner of service of a foreign attachment is provided for in Rule 11 of the Admiralty Rules of this Court which is as follows:

"11.

SERVICE OF FOREIGN ATTACHMENT, AND OF PROCESS AGAINST FREIGHT AND PROCEEDS.

When the property, effects, or credits named in any process of foreign attachment, are not delivered up to the marshal by the garnishee or are denied by him to be the property of the party defendant, it shall be a sufficient service of such foreign attachment to leave a copy thereof with such garnishee, or at his usual residence or place of business, with notice of the property attached; and on due return thereof by the marshal the libellant, on proof satisfactory to the Court that the property belongs to the defendant, may proceed to a hearing and final decree in the cause. If the defendant appears, fur-

ther proceedings may be had as is usual in suits IN PERSONAM."

In addition to leaving a copy of the foreign attachment with the garnishee this rule requires that there also be left with him "a notice of the property attached." The old rule required only that a copy of the foreign attachment be left with the garnishee. The words "with notice of the property attached" were added for a purpose, and I believe that purpose was to make the manner of service conform to the manner of service of writs of attachment under the State law. The New York, rules, from which the rule of this Court was taken, formerly provided that service might be made by leaving a copy of the attachment with the garnishee, but that rule has been amended so that it too now requires that [44] notice of the property attached be also left with him. This manner of service conforms both here and in New York to the manner of service of an attachment in each State. There are many decisions in each State holding that the giving of a notice of the property attached is essential to a valid garnishment. As no service upon respondent can be had, the only jurisdiction that the Court can have is over his property or effects in this District. To acquire such jurisdiction the rules must be adhered to in all essentials. In the absence of a statute on the subject they have the force of law. It would be an idle thing to amend the rule so as to require notice of the property attached to be given or left with the garnishee, and upon the first occasion when the question arises, to say that the requirement is without any significance.

The present rules were prepared by a Committee of the Admiralty Bar, and adopted by the Court as an improvement over the ones formerly in use, and there is no reason why they should not be given effect.

As there was no valid service of the attachments upon the garnishees named, and as such service is essential to the jurisdiction of the Court over respondent's property, effects or credits in this District, the motion to vacate will be granted, and it is so ordered.

May 27th, 1921.

M. T. DOOLING,
Judge.

[Endorsed]: Filed May 27, 1921. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [45]

In the Southern Division of the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY.

G. H. ATKINS, CLIFTON H. KROLL, DAVID ATKINS and DAVID GOODALE,

Libelants,

VS.

W. R. CARPENTER AND CO., LTD., a Corporation,

Respondent.

Notice of Motion on Special Appearance to Vacate Attachment.

To the Libelants Above Named and to Louis T. Hengstler, Esq., Their Proctor:

You and each of you will please take notice that respondent's motion on special appearance to vacate attachment, served and filed herein will be made on Saturday the 11th day of June, 1921, at 10 o'clock A. M., or as soon thereafter as counsel can be heard in the courtroom of the above-entitled court in Room 332 in the Postoffice Building in the city and county of San Francisco.

The said motion will be based upon the pleadings, papers, and documents on file herein including said motion and the affidavit of Alfred E. Wolff in support thereof and this notice of motion.

Dated: June 1st, 1921.

WILLIAM DENMAN,

Proctor for Respondent, W. R. Carpenter and Co., Ltd., Appearing Specially to Vacate Attachment. Receipt of a copy of the within is hereby admitted this 2d day of June, 1921.

ANDROS & HENGSTLER, Attorney for Libelants.

[Endorsed]: Filed June 3, 1921. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [46] In the Southern Division of the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY.

G. H. ATKINS, CLIFTON H. KROLL, DAVID ATKINS and DAVID GOODALE,

Libelants.

VS.

W. R. CARPENTER AND CO., LTD., a Corporation.

Respondent.

Motion on Special Appearance to Vacate Attachment.

To the Honorable Judges of the Said District Court: The undersigned respondent above described herein hereby appears specially (and not generally) to vacate attachment to be levied upon its credits, effects and property alleged to be in the hands of, or under the control of, Wolff, Kirchmann & Co., a corporation, and moves to vacate the attachment and garnishment attempted to be made herein by attempted service on said Wolff, Kirchmann & Co. on the grounds:

- That no citation in the nature of a summons to appear and answer to the suit has been issued herein, as required by the rules of this Court, or at all.
- That the Court has not ordered the issuance of a citation or any proper process herein.
 - That no attempt has been made to find the

respondent in the said District by the United States marshal, or at all.

- 4. That no attempt has been made by the marshal to find or attach any of respondent's goods and chattels in the said District for the amount sued for, or at all.
- 5. That the marshal has not attached any of respondent's credits and effects in the hands of Wolff, Kirchman Co. because: the marshal did not serve upon said Wolff, Kirchmann & Co. any [47] form of attachment, complying with the rules of said Court, by leaving a copy thereof with Wolff, Kirchmann & Co., or at its usual residence or place of business.
- 6. That the marshal has not attached any of respondent's credits and effects in the hands of Wolff, Kirchmann & Co. because the marshal did not leave with said Wolff, Kirchmann & Co. at its usual residence or place of business, or at all, any notice of the property attached.
- 7. The marshal did not at any time request Wolff, Kirchmann & Co. to deliver up to the Marshal any property, effects or credits named in said purported process, or at all, but simply, without giving Wolff, Kirchmann & Co. any opportunity to deliver up, or to know that it might deliver up such, or any property to the marshal, handed to the said Wolff, Kirchmann & Co. a copy of the purported form of attachment returned by the marshal herein, and immediately left the said Wolff, Kirchmann & Co., before it had an opportunity to read the same.
 - 8. That no summons was served on garnishee,

Wolff, Kirchmann & Co., to appear before said Court, as provided in the monitions issued herein.

- 9. That the said Wolff, Kirchmann & Co. was at no time cited to appear and answer on oath.
- 10. That no due or other proof of demand, (1) as to the first cause of libel, or (2) as to the second cause of libel, or (3) as to the third cause of libel or as to any or all causes of libel herein, has been made first or at all to the said Court.
- 11. That no due or other proof of the propriety of the attachment has been made to the Court.
- 12. That the specific property in the hands of Wolff, Kirchmann & Co. has not been stated in the libel, or in the process.
- 13. That at the time of the attempted levy of the said [48] attachment, there were no property, credits or effects of, or due or owing to, the respondent, W. R. Carpenter & Co., Ltd., in the hands of, or under the control of, said Wolff, Kirchmann & Co.; that at said time it appeared upon the books of said corporation that certain stock in the said corporation had been issued to the respondent; but at the time of the attempted attachment and garnishment herein, respondent was not the owner of the said stock, and the said stock was not due or owing to it, nor was it in the hands or under the control of said Wolff, Kirchmann & Co.

That said motion will be made upon the pleadings, orders, process and return and all documents on file herein, and upon the affidavit of A. E. Wolff hereunto annexed.

WHEREFORE, the said W. R. Carpenter and Co., Ltd., moves and prays for a vacation of said attempted attachment and garnishment, and for such other and further relief as to the Court may seem proper.

WILLIAM DENMAN,

Proctor for Respondent, W. R. Carpenter and Co., Ltd., Appearing Specially (and not Generally) to Vacate Attachment.

Receipt of a copy of the within notice to vacate attachment is hereby admitted this 31st day of May, 1921.

ANDROS & HENGSTLER, Attorney for Libelant.

[Endorsed]: Filed June 3, 1921. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [49]

In the Southern Division of the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY.

G. H. ATKINS, CLIFTON H. KROLL, DAVID ATKINS and DAVID GOODALE,

Libelants.

VS.

W. R. CARPENTER & CO., LTD., a Corporation, Respondent.

Affidavit of A. E. Wolff.

State of California, City and County of San Francisco,—ss.

Alfred E. Wolff, being first duly sworn, deposes and says: That he is the representative of Wolff, Kirchmann & Co. authorized to accept service of process, and was in the month of April, 1919. That on or about the 25th day of April, 1919, a young gentleman, whom he now understands to be Mr. Maguire, a deputy United States marshal, approached him in the office of Wolff, Kirchmann & Co. Mr. Maguire asked affiant whether he was authorized to accept process for Wolff, Kirchmann & Co., and affiant answered that he was authorized to accept such process. Mr. Maguire then handed him a copy of the writ of attachment addressed to the marshal, and retired before affiant had an opportunity to read to the document. There was no discussion of any kind between affiant and Mr. Maguire as to the property attempted to be attached by the service of the document, nor was there any discussion of the contents of the document. Affiant was at no time requested to deliver to Mr. Maguire, as deputy marshal, or otherwise, any property which he or Wolff, Kirchmann & Co. might have had belonging to respondent in this case. Affiant did not decline to deliver up to the marshal any property, effects or credits named in the said document, or at all. He was not [50] given an opportunity to do this, nor was he at any time advised that he was entitled to or expected to deliver up or pay to the marshal any property, effects or credits of any kind. No other document was served on him at any time.

That W. R. Carpenter & Co., Ltd., had no property, effects or credits in the hands of Wolff, Kirchmann & Co., at the time of said attempted service of said writ of attachment. That W. R. Carpenter & Co., Ltd., had had issued to it certain shares of stock of Wolff, Kirchmann & Co. which had not been transferred on the books of said Company from W. R. Carpenter & Co., Ltd., to any other person, but which it is claimed were transferred in fact prior to said attachment. That said shares were not in the hands of Wolff, Kirchmann & Co., at the time of the attempted service of said writ.

ALFRED E. WOLFF.

Subscribed and sworn to before me, this 31 day of June, A. D. 1921.

[Seal] CHARLES EDELMAN,

Notary Public in and for the City and County of San Francisco, State of California.

My commission expires April 7, 1922.

Receipt of a copy of the within affidavit of Alfred E. Wolff is hereby admitted this 31st day of May, 1921.

ANDROS & HENGSTLER, Attorney for Libellant.

[Endorsed]: Filed June 3, 1921. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [51]

At a stated term of the District Court of the United States, for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, State of California, on Saturday the second day of July, in the year of our Lord one thousand nine hundred and twenty-one. Present: The Honorable MAURICE T. DOOLING, Judge.

No. 16,552.

G. H. ATKINS et al.

VS.

W. R. CARPENTER & CO., LTD.

Order Granting Motion to Vacate Attachment Re Wolff, Kirchmann & Co.

This cause came on regularly this day for hearing of the motion to vacate attachment heretofore issued herein. After hearing proctors for respective parties, the Court ordered that said motion be and the same is hereby granted and that execution thereof be stayed for the period of ten (10) days. [52]

In the Southern Division of the District Court of the United States, for the Northern District of California, First Division.

IN ADMIRALTY.

G. H. ATKINS, CLIFTON H. KROLL, DAVID ATKINS and DAVID GOODALE,

Libelants,

VS.

W. R. CARPENTER AND CO., LTD., a Corporation,

Respondent.

WOLFF, KIRCHMANN & CO., a Corporation, Garnishee.

Notice of Appeal.

To W. R. Carpenter & Co., Ltd., a Corporation, Respondent; Wolff Kirchmann & Co., a Corporation, Garnishee; and to William Denman, Esq., Their Proctor, and to the Clerk of the District Court of the United States for the Northern District of California:

You and each of you will please take notice that the libelants above named hereby appeal to the next United States Circuit Court of Appeals for the Ninth Circuit from that certain order of the District Court of the United States for the Northern District of California, made and entered in the above-entitled cause on July 2d, 1921, vacating the foreign attachment against said garnishee.

Dated: San Francisco, California, July 12th, 1921. ANDROS & HENGSTLER, F. W. DORR,

Proctors for Libelants.

Due service and receipt of a copy of the within notice of appeal is hereby admitted this 12th day of July, 1921.

WILLIAM DENMAN,

Proctor for Respondent and Garnishee Wolff, Kirchmann & Co.

[Endorsed]: Filed July 12, 1921. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [54]

In the Southern Division of the District Court of the United States for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,552.

G. H. ATKINS, CLIFTON H. KROLL, DAVID ATKINS and DAVID GOODALE,

Libelants,

VS.

W. R. CARPENTER & CO., LTD., a Corporation, Respondent.

WOLFF, KIRCHMANN & CO., LTD., a Corporation,

Garnishee.

Assignment of Errors.

Libelants above named assign errors in the proceedings and order of the District Court as follows:

I.

The District Court erred in finding that no notice of the property attached was given to the garnishee above named.

II.

The District Court erred in finding that Rule 11 of the District Court rules requires that in addition to leaving a copy of the foreign attachment with the garnishee, there must also be left with him "a notice of the property attached."

III.

The District Court erred in finding that there was no valid service of the attachment upon the garnishee above named.

IV.

The District Court erred in granting respondent's motion vacate the attachment against the above named garnishee. [55]

Dated: July 12th, 1921.

ANDROS & HENGSTLER, F. W. DORR,

Proctors for Libelants.

Receipt of a copy of the within assignment or errors is hereby admitted this 12th day of July, 1921.

WILLIAM DENMAN.

Proctor for Respondents and Garnishee, Wolff, Kirchmann & Co.

[Endorsed]: Filed July 12, 1921. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [56] In the Southern Division of the District Court of the United States for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,552.

G. H. ATKINS, CLIFTON H. KROLL, DAVID ATKINS and DAVID GOODALE,

Libelants,

VS.

W. R. CARPENTER & CO., LTD., a Corporation, Respondent.

WOLFF, KIRCHMANN & CO., a Corporation, Garnishee.

Stipulation in Regard to Appeal Bond, Etc.

IT IS HEREBY STIPULATED that the libelants above named in order to perfect their appeal from the order made and entered herein on the 2d day of July, 1921, dismissing the foreign attachment against Wolff, Kirchmann & Co., a corporation, garnishee, may file a single bond on appeal in the sum of \$1000.00, with sufficient surety, conditioned as provided in the admiralty rules of the United States Circuit Court of Appeals for the Ninth Circuit, and that said bond shall operate as a bond for costs on appeal and also as a bond to stay the execution of said order of dismissal during said appeal.

The death of David Goodale, one of the libelants herein, having been suggested, it is hereby stipulated that this action may continue in the names of G. H. Atkins, Clifton H. Kroll and David Atkins, the

surviving libelants [57] and surviving copartners of Atkins, Kroll & Company.

Dated July 21st, 1921.

ANDROS & HENGSTLER,
Proctors for Libelants.
WILLIAM DENMAN.

Proctors for Respondent and Garnishee. It is so ordered.

WM. W. MORROW, Circuit Judge.

[Endorsed]: Filed July 22, 1921. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk. [58]

Certificate of Clerk U. S. District Court to Apostles on Appeal.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 58 pages, numbered from 1 to 58, inclusive, contain a full, true, and correct transcript of certain records and proceedings in the case of G. H. Atkins, et al. Libelants, vs. W. R. Carpenter & Co., Ltd., Respondent, No. 16,552, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the praecipe for apostles on appeal and the instructions of the proctors for libelants and appellants herein.

I further certify that the cost for preparing and certifying the foregoing apostles on appeal is the sum of Twenty-one Dollars and Ninety-five Cents (\$21.95), and that the same has been paid to me by the proctors for appellants herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 30th day of September, A. D. 1921.

[Seal]

WALTER B. MALING,

Clerk.

By C. W. Taylor, Deputy Clerk. [59]

[Endorsed]: No. 3779. United States Circuit Court of Appeals for the Ninth Circuit. G. H. Atkins, Clifton H. Kroll, David Atkins and David Goodale, Appellants, vs. W. R. Carpenter & Co., Ltd., a Corporation, and Wolff, Kirchmann & Co., a Corporation, Appellees. Apostles on Appeal. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Filed October 1, 1921.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien, Deputy Clerk. In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 16,552 (District Court).

G. H. ATKINS, CLIFTON H. KROLL and DAVID ATKINS,

Appellants,

VS.

W. R. CARPENTER & COMPANY, LTD., a Corporation, and WOLFF, KIRCHMANN & COMPANY, a Corporation,

Appellees.

Stipulation and Order Extending Time to and Including October 10, 1921, to File Record and Docket Cause.

IT IS HEREBY STIPULATED that the appellants above named may have to and including the 10th day of October, 1921, within which to file the record and docket the above-entitled action upon appeal in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: September 8th, 1921.

ANDROS & HENGSTLER, LOUIS T. HENGSTLER, F. W. DORR,

Proctors for Appellants.
WILLIAM DENMAN,
Proctor for Appellees.

It is so ordered.

W. H. HUNT,

Judge of the Circuit Court of Appeals of the United States in and for the Ninth Circuit.

[Endorsed]: No. 3779. No. 16,552 (District Court). In the United States Circuit Court of Appeals for the Ninth Circuit. G. H. Atkins, Clifton H. Kroll and David Atkins, Appellants, vs. W. R. Carpenter & Co., a Corporation, and Wolff, Kirchmann & Co., a Corporation, Appellees. Stipulation Extending Time to File and Docket on Appeal. Filed Sep. 10, 1921. F. D. Monckton. Refiled Oct. 1, 1921. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 16,552 (District Court).

G. H. ATKINS, CLIFTON H. KROLL and DAVID ATKINS,

Appellants,

VS.

W. R. CARPENTER & CO., LTD., a Corporation, and WOLFF-KIRCHMANN & CO., a Corporation,

Appellees.

Stipulation and Order Extending Time to and Including September 10, 1921, to File Record and Docket Cause.

IT IS HEREBY STIPULATED that the appellants above named may have to and including the

10th day of September, 1921, within which to file the record and docket the above-entitled action upon appeal in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated August 9th, 1921.

ANDROS & HENGSTLER, LOUIS T. HENGSTLER, F. W. DORR,

Proctors for Appellants.
WILLIAM DENMAN,
Proctors for Appellees.

It is so ordered.

W. H. HUNT,

Judge of the Circuit Court of Appeals of the United States in and for the Ninth Circuit.

[Endorsed]: No. 3779. In the United States Circuit Court of Appeals for the Ninth Circuit. G. H. Atkins et al., Appellants, vs. W. R. Carpenter & Co., Ltd., a Corporation, et al., Appellees. Stipulation Extending Time to File and Docket on Appeal. Filed Aug. 9, 1921. F. D. Monckton, Clerk. Refiled Oct. 1, 1921. F. D. Monckton, Clerk.

No. 3779

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

G. H. ATKINS, CLIFTON H. KROLL, DAVID ATKINS and DAVID GOODALE,

Appellants,

VS.

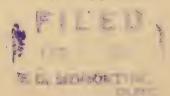
W. R. Carpenter & Co., Ltd. (a corporation), and Wolff, Kirchmann & Co. (a corporation),

Appellees.

BRIEF FOR APPELLANTS.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Andros & Hengstler,
Louis T. Hengstler,
F. W. Dorr,
Proctors for Appellants.





IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

G. H. ATKINS, CLIFTON H. KROLL, DAVID ATKINS and DAVID GOODALE,

Appellants,

VS.

W. R. CARPENTER & Co., LTD. (a corporation), and Wolff, Kirchmann & Co. (a corporation),

Appellees.

BRIEF FOR APPELLANTS.

Statement of the Case.

This is an appeal from an order of the United States District Court quashing the service of a foreign attachment levied against Wolff, Kirchmann & Co., a corporation, as garnishee. The appellants, libelants below, are copartners engaged in the shipping and commission business at San Francisco, under the firm name of Atkins. Kroll & Co. The appellee, W. R. Carpenter & Co., Limited, respondent below, is an Australian corporation, and had no officer or agent within the jurisdiction of the court, and had no goods, credits or effects within the juris-

diction, other than 300 shares of the capital stock of Wolff, Kirchmann & Co., which were attached under the process of the court.

The effect of the discharge of the foreign attachment was to release the shares of stock and place them beyond the reach of the process of the court, and virtually ended libelants' action against the respondent.

The libel, which was filed on April 24, 1919, alleged the breach by respondent of three contracts of affreightment whereby respondent had agreed to furnish to certain schooners operated by libelants, full cargoes of copra for three voyages from Sydney, Australia, or other named ports, to San Francisco, and to pay to libelants, freight money at agreed rates per ton; the libel further alleged damages to libelants aggregating \$94,360, and concluded with a prayer for process against the respondent with the usual clause of foreign attachment:

"that in case respondent cannot be found, then that its goods and chattels be attached to the amount sued for; and that, if sufficient goods and chattels cannot be found, its credits and effects be attached in the hands of American Trading Company, and of Wolff, Kirchmann & Co., garnishees, and of any other garnishees having credits and effects of said respondent in hands; and that the said garnishees may be cited to appear and answer on oath as to credits and effects in their hands and belonging to said respondent; and that this Honorable Court would be pleased to decree," etc.

(Apostles, p. 27.)

At the end of the libel was an order by the court for the issuance of process, as follows:

"Let process issue as prayed for."
(Apostles, p. 28.)

On the same day on which the libel was filed there was issued a citation directed to the respondent, which was afterwards filed, with the return of the U.S. Marshal endorsed thereon, as follows:

"I hereby certify and return, that on the 24th day of April, 1919, I received the attached citation and that after diligent search, I am unable to find the within named respondent, W. R. Carpenter & Co., Ltd., a corporation, within my district.

J. B. Holohan, United States Marshal, By Harold Maguire, Deputy United States Marshal."

(Apostles, p. 5.)

On the same day, to-wit, April 24, 1919, there was issued also a citation and writ of foreign attachment directed to the garnishees American Trading Company, and Wolff, Kirchmann & Co., and said process was served upon said garnishees by a deputy United States marshal on the following day (Apostles, pp. 5, 6, 7, 30-33).

This process in foreign attachment recited the filing of the libel, and directed the marshal, *interalia*, to attach the respondent's

"credits and effects to the amount sued for, in the hands of American Trading Company, and of Wolff, Kirchmann & Co., garnishees, and of any other garnishees having credits and effects of said respondent in hand, and that you summon the said garnishees to appear before the said District Court on the said 6th day of May, 1919, to do and abide what may be required of them in this behalf."

(Apostles p. 31.)

The service by the marshal of this writ of foreign attachment, which has been attacked by counsel for respondent, and which was the basis of the order of the District Court dissolving the attachment, is set forth in the following return:

"United States Marshal's Return of Service of Citation with Order for Foreign Attachment.

I hereby certify and return that I received the attached citation with order for foreign attachment, at San Francisco, California, on April 24, 1919, and after due and diligent inquiry made, I am unable to find the respondent, W. R. Carpenter & Co., Ltd., a corporation, or any goods and chattels of said respondent, within my district.

I further return that at San Francisco within the said Northern District of California, on the 25th day of April, 1919, I attached all the credits and effects of W. R. Carpenter & Co., Ltd., a corporation, not to exceed the sum of \$94,360, due or owing to W. R. Carpenter & Co., Ltd., a corporation, in the hands or under the control of Wolff, Kirchmann & Co., a corporation, by handing to and leaving a copy of the attached citation and order for foreign attachment with Mr. A. E. Wolff, president of said corporation, personally, and admonishing him of the remedy demanded by said citation and order.

I further return that I cited and admonished said garnishee, Wolff, Kirchmann & Co., a corporation, named herein, to appear before the United States District Court at San Francisco, California, on the 6th day of Mav. 1919, at 10 o'clock A. M., of said day to make return of any credits and effects due the above-named respondent, and to do and abide by what may be required of them in this behalf.

J. B. HOLOHAN, U. S. Marshal, By Harold Maguire, Deputy. San Francisco, California, April 25, 1919.'' (Apostles, pp. 32, 33.)

There were two garnishees, the American Trading Company and Wolff, Kirchmann & Co. A part of the record on this appeal relates to the American Trading Company attachment, which was first dissolved by the District Court. Subsequently the attachment against Wolff, Kirchmann & Co. was dissolved upon substantially the same grounds that had been urged on the motion to dismiss the American Trading Company attachment. In order to place the facts fully before this court, it was necessary to include in the apostles much that related to the American Trading Company attachment, including the opinion of the District Judge on the motion to dismiss (Apostles, p. 49), and a stipulation in regard to the facts of the American Trading Company attachment (Apostles, p. 38). The Wolff, Kirchmann Co. attachment only, is involved in this appeal.

After the service of the process of foreign attachment was made upon Wolff, Kirchmann & Co., the garnishee served and filed an answer in the form of a verified statement, which answer recited:

"That at the date the United States Marshal handed it a copy of the writ herein, it had no goods and chattels or credits and effects belonging to said W. R. Carpenter & Co., Ltd., a corporation, respondent in the above-entitled action, nor has it since had any; that said W. R. Carpenter & Co., Ltd., a corporation, owns 300 shares of stock of said Wolff, Kirchmann & Co., Inc., of a par value of \$100 each; that said shares of stock are fully paid up.

Dated, May 22, 1919.

WOLFF, KIRCHMANN & Co., INC., By Alfred E. Wolff,

President.

WILLIAM DENMAN,
Proctor for Wolff, Kirchmann & Co., Inc."

(Apostles, p. 35.)

It will be noted that the same proctor who appeared for the garnishee, appeared later for the respondent, and moved to set aside the attachment on the ground that the garnishee had not received notice.

Thereafter, in July, 1919, an amended statement of said garnishee was served and filed. By this amendment the garnishee added to paragraph I of the original statement, the following sentence:

"That at the time of the receipt of said copy of said writ the said W. R. Carpenter and Co., Ltd., appeared in the books and records of the said Wolff, Kirchmann & Co., Inc., as the owner of said 300 shares of stock.

Dated: July 10th, 1919.

WOLFF, KIRCHMANN AND CO., INC., By Alfred E. Wolff,

President.

WILLIAM DENMAN, Proctor for Wolff, Kirchmann & Co., Inc."

(Apostles, p. 37.)

The next step relative to the Wolff, Kirchmann & Co. attachment was taken in January, 1920, when the proctors for the libelants served and filed a notice of motion for the delivery of the property in the hands of the garnishee (Apostles, p. 11). On January 31, 1920, the garnishee filed an answer to the motion of libelants, accompanied by an affidavit by the proctor for the garnishee (Apostles, p. 11). On September 4, 1920, libelants' motion for delivery of shares of stock by the garnishee was withdrawn (Apostles, p. 12).

In the meantime proceedings had been taken relative to the American Trading Company attachment to ascertain if that garnishee had any credits or effects of the respondent in its possession when the writ was served. The matter was referred to the United States Commissioner to take and report the testimony upon the issues. Those proceedings continued from time to time until September 18, 1920, when the exceptions to the commissioner's report were argued before the United States District Judge and were ordered submitted (Apostles, p. 12).

During all of the time subsequent to the service of the process on April 25, 1919, until September 28, 1920, no steps were taken by any of the parties to dissolve either of the attachments. On the latter date, the respondent, appearing specially by the same proctor who had represented Wolff, Kirchmann & Co. in the attachment proceedings, filed a motion to vacate the attachment against the American Trading Company (Apostles, p. 12), alleging thirteen grounds why the attachment should be vacated, the first twelve of said grounds being identical with the first twelve grounds in its subsequent motion to vacate the attachment against Wolff, Kirchmann & Co. (Apostles, p. 39).

The motion to vacate the American Trading Company attachment came on for hearing before the District Court and was argued and submitted, and on May 27, 1921, an opinion was filed and an order entered granting the motion to vacate the service of attachment upon the garnishee (Apostles, pp. 13, 49) (273 Fed. 828).

The court held that Rule 11 of the District Court, requiring notice of the property attached to be given to the garnishee, had not been complied with by the marshal, and that there had been no valid service of the attachment (Apostles, pp. 52-3).

Thereafter, on June 3, 1921, and more than two years after the attachment had been served upon Wolff, Kirchmann & Co., as garnishee, the respondent appeared specially and moved to vacate the

Wolff, Kirchmann & Co. attachment (Apostles, p. 15).

The motion set forth thirteen alleged grounds why the attachment should be vacated, as follows:

- "1. That no citation in the nature of a summons to appear and answer to the suit has been issued herein, as required by the rules of this court, or at all.
- 2. That the court has not ordered the issuance of a citation or any proper process herein.
- 3. That no attempt has been made to find the respondent in the said district by the United States marshal, or at all.
- 4. That no attempt has been made by the marshal to find or attach any of respondent's goods and chattels in the said district for the amount sued for, or at all.
- 5. That the marshal has not attached any of respondent's credits and effects in the hands of Wolff, Kirchmann Co. because: the marshal did not serve upon said Wolff, Kirchmann & Co. any form of attachment, complying with the rules of said court, by leaving a copy thereof with Wolff, Kirchmann & Co., or at its usual residence or place of business.
- 6. That the marshal has not attached any of respondent's credits and effects in the hands of Wolff, Kirchmann & Co. because the marshal did not leave with said Wolff, Kirchmann & Co. at its usual residence or place of business, or at all, any notice of the property attached.
- 7. The marshal did not at any time request Wolff, Kirchmann & Co. to deliver up to the Marshal any property, effects or credits named in said purported process, or at all, but simply, without giving Wolff, Kirchmann & Co. any opportunity to deliver up, or to know that it might deliver up such, or any property to the

marshal, handed to the said Wolff, Kirchmann & Co. a copy of the purported form of attachment returned by the marshal herein, and immediately left the said Wolff, Kirchmann & Co., before it had an opportunity to read the same.

- 8. That no summons was served on garnishee, Wolff, Kirchmann & Co., to appear before said Court, as provided in the monition issued herein.
- 9. That the said Wolff, Kirchmann & Co. was at no time cited to appear and answer on oath.
- 10. That no due or other proof of demand, (1) as to the first cause of libel, or (2) as to the second cause of libel, or (3) as to the third cause of libel or as to any or all causes of libel herein, has been made first or at all to the said court.
- 11. That no due or other proof of the propriety of the attachment has been made to the court.
- 12. That the specific property in the hands of Wolff, Kirchmann & Co. has not been stated in the libel, or in the process.
- 13. That at the time of the attempted levy of the said attachment, there were no property, credits or effects of, or due or owing to, the respondent, W. R. Carpenter & Co., Ltd., in the hands of, or under the control of, said Wolff, Kirchmann & Co.; that at said time it appeared upon the books of said corporation that certain stock in the said corporation had been issued to the respondent; but at the time of the attempted attachment and garnishment herein, respondent was not the owner of the said stock, and the said stock was not due or owing to it, nor was it in the hands or under the control of said Wolff, Kirchmann & Co."

(Apostles, pp. 55-57.)

In support of the motion there was filed an affidavit by A. E. Wolff, representative of Wolff, Kirchmann & Co., in which he stated:

"That on or about the 25th day of April, 1919, a young gentleman, whom he now understands to be Mr. Maguire, a deputy United States marshal, approached him in the office of Wolff, Kirchmann & Co. Mr. Maguire asked affiant whether he was authorized to accept process for Wolff, Kirchmann & Co., and affiant answered that he was authorized to accept such process. Mr. Maguire then handed him a copy of the writ of attachment addressed to the marshal, and retired before affiant had an opportunity to read the document. There was no discussion of any kind between affiant and Mr. Maguire as to the property attempted to be attached by the service of the document, nor was there any discussion of the contents of the document. Affiant was at no time requested to deliver to Mr. Maguire, as deputy marshal, or otherwise, any property which he or Wolff. Kirchmann & Co. might have had belonging to respondent in this case. Affiant did not decline to deliver up to the marshal any property, effects or credits named in the said document, or at all. He was not given an opportunity to do this, nor was he at any time advised that he was entitled to or expected to deliver up or pay to the marshal any property, effects or credits of any kind. No other document was served on him at any time."

(Apostles, pp. 59-60.)

Note that the affiant does not state that he did not receive notice of the property attached. The answer filed by the garnishee shows that he did receive the notice.

This was the only affidavit filed, or showing of any kind made, by respondent in support of its motion to vacate this attachment. It is true that in the notice of motion counsel referred to the "pleadings, orders, process and return and all documents on file herein", but none of the "documents" referred to relate to the Wolff, Kirchmann & Co. attachment.

The motion came on for hearing, and on July 2, 1921, the District Court entered an order vacating the attachment. No opinion was filed, but the court followed its previous ruling in the matter of the American Trading Company attachment (Apostles, p. 40). From this order the libelants have appealed to this court and have filed the following:

Assignment of Errors.

I.

"The District Court erred in finding that no notice of the property attached was given to the garnishee above named.

II.

The District Court erred in finding that Rule 11 of the District Court rules requires that in addition to leaving a copy of the foreign attachment with the garnishee, there must also be left with him 'a notice of the property attached'.

III.

The District Court erred in finding that there was no valid service of the attachment upon the garnishee above named.

IV.

The District Court erred in granting respondent's motion to vacate the attachment against the above named garnishee."

(Apostles, p. 64.)

Argument.

We will confine our discussion principally to the alleged ground upon which the District Court vacated the service, namely: that no notice of the property attached was given to the garnishee. None of the other twelve alleged grounds were considered by the court, and no showing was made by respondent in support of them.

The thirteenth alleged ground,

"that at the time of the attempted levy of the said attachment, there were no property, credits or effects of, or due or owing to, the respondent, W. R. Carpenter & Co., Ltd., in the hands of, or under the control of, said Wolff, Kirchmann & Co.," etc.

would not, if true, affect the validity of the attachment, nor would it be a ground for setting aside the service of the writ. That issue would be properly raised by the answer of the garnishee, but not on a motion to quash *the service* of the writ. It has never been before the court for decision.

The decision of the District Court was on the ground, as set forth in the opinion, that

"the only service on the garnishees was by leaving a copy of the process with them." (Apostles, p. 51.)

Admiralty Rule 11 of the District Court is set forth in the opinion, to show the manner of service of a foreign attachment, and is as follows:

"When the property, effects, or credits named in any process of foreign attachment, are not delivered up to the marshal by the garnishee or are denied by him to be the property of the party defendant, it shall be a sufficient service of such foreign attachment to leave a copy thereof with such garnishee, or at his usual residence or place of business, with notice of the property attached."

(Apostles, p. 51.)

The opinion then states:

"In addition to leaving a copy of the foreign attachment with the garnishee this rule requires that there also be left with him 'a notice of the property attached."

(Apostles, p. 52.)

Compare this last quotation with the wording of the rule and note the difference.

The rule states:

"a copy thereof * * * with notice of the property attached."

The opinion reads:

"in addition to leaving a copy * * * there must also be left * * * a notice of the property attached."

This is a material difference. Under the wording of the rule there is a sufficient service if the

process gives notice of the property attached. The rule does not specify a separate notice, nor does it require that in addition to the process there shall be also a notice of the property attached.

It may be urged that this is a technical distinction, but it must be remembered that the service of the attachment has been attacked on hyper-technical grounds more than two years after the service was made, and that the appellants are before this court because of the technicalities which have been urged by respondent to prevent a decision of this case upon the merits.

The opinion of the court then states:

"The old rule required only that a copy of the foreign attachment be left with the garnishee. The words 'with notice of the property attached' were added for a purpose, and I believe that purpose was to make the manner of service conform to the manner of service of writs of attachment under the state law. New York rules, from which the rule of this court was taken, formerly provided that service might be made by leaving a copy of the attachment with the garnishee, but that rule has been amended so that it too now requires that a notice of the property attached be also left with This manner of service conforms both here and in New York to the manner of service of an attachment in each State. There are many decisions in each state holding that the giving of a notice of the property attached is essential to a valid garnishment."

(Apostles, p. 52.)

In other words, the District Judge was of the opinion that prior to 1916, when the rules were

amended, no notice to the garnishee was necessary, but that when the rules had been changed to conform to the state practice, a separate notice to the garnishee became necessary. Is this correct? We have been unable to find any authority to support this view, and an examination of the rules and the decisions of the courts of both districts, shows that it is erroneous.

The "old rule" referred to by the District Judge was in the admiralty rules of the District Court for the Southern District of New York, which were followed in the Northern District of California, prior to 1916, when the present admiralty rules were adopted.

(Preface to District Court Rules, p. v.)

Rule 30 of the New York old rules, adopted in the year 1838, provided:

"When the property, effects or credits named in the process are not delivered up to the marshal by the garnishee or trustee, or are denied by him to be the property of the party, it shall be a sufficient service of such foreign attachment to leave a copy thereof with such trustee, or at his residence or usual place of business, unless the libelant shall by competent surety indemnify the marshal for arresting the property pointed out to him."

(Dunlap's Admiralty Practice, p. 333.)

There was no mention in the rule of notice to the garnishee, yet, nevertheless, a notice to the garnishee was just as essential as it was after the rules were amended, but the notice did not need to be a separate notice apart from the writ.

The opinion of Judge Blatchford in the case of Cushing v. Laird, (D. C., N. Y.) 6 Fed. Cs. No. 3508, contains a lengthy discussion of the manner of serving a writ of foreign attachment on a garnishee:

"The attachment of credits and effects in the hands of a garnishee may be made, without actual levy on or arrest thereof, by the service on the garnishee of a notice apprising him of what the process demands, and for what cause, and warning him of the time and place when he must appear before the court and respond concerning the existence of such credits and effects and their status. Ben. Adm. 430; Conk. Adm. 481."

Here is stated the fundamental requirement in the service on the garnishee. There must be a notice of the property attached. How must that notice be given? The opinion continues:

"In this case, the third process contains such a notice on the face of it. The service of the process on Foster and Thomson was, therefore, a service of such notice, and such service constituted a sufficient attachment of any credits and effects in their hands belonging to the respondent."

This is exactly what was done in the case at bar.

The third process, referred to in the opinion,

"commanded the marshal to cite the respondent, if found in this district, and, if he could not be found, to attach his goods and chattels to the amount sued for, and, if such property could not be found, to attach his credits and effects to the amount sued for, in the hands of Foster and Thomson and the assistant treasurer of the United States, his garnishees."

(6 Fed. Cs., p. 1018.)

This process was almost identical in form with the process in foreign attachment which was served in the present case, which read:

"Now, therefore, we do hereby empower, and strictly charge and command you, the said marshal, that you warn the said respondent, if it shall be found in your district, to be before the said District Court of the United States, at the United States Postoffice Building, in the City and County of San Francisco, on the 6th day of May, 1919, at 10 o'clock a. m., then and there to answer the said libel, and to make its allegations in that behalf; and if the said respondent cannot be found in your district, we further command you that you attach its goods and chattels in your district to the amount sued for, and if no goods and chattels can be found. that you attach his credits and effects to the amount sued for, in the hands of American Trading Company, and of Wolff Kirchman & Co., garnishees, and of any other garnishees having credits and effects of said respondent in hand; and that you summon the said garnishees to appear before the said District Court on the said 6th day of May, 1919, to do and abide what may be required of them in this behalf; and have you then and there this writ, with your return thereon."

(Apostles, p. 31.)

The opinion in the above case also states (pp. 1018-19):

"An objection is taken to the first two processes, because they do not on their faces contain a citation to the garnishees. I do not think that is necessary. The attachment of the credits and effects in the hands of the garnishees may be made, as before stated, by actual levy on or arrest thereof, or by notice. The notice

need not be in the process. But the return should show how the attachment was made. Inasmuch as, in the first two processes, there is no citation to the garnishees, the returns to those processes should show that the notice before specified was given to the garnishees."

This opinion was written in the year 1870, many years before the admiralty rules were amended so as to require the notice to be stated in the process. Yet the reasons for the notice were as true then as they are today. Note, that the first two writs which were issued did not contain a notice on their face, and the court held that the marshal's return must show that notice had been given to the garnishees. The third writ, however, contained the notice to the garnishees on its face, and as we have stated, in the same form as the writ which was issued in the present case. The court held that the service of the third writ was service of notice.

Similarly, in the case at bar, the service of the writ was the service of notice.

Rule 31 of the old New York rules provided:

"On the return by the marshal of service of such attachment by notice and copy with the reason thereof, the libelant," etc.

(Dunlap's Admiralty Practice, p. 333.)

Here is a reference to the notice in the old rules which were adopted in 1838.

When the old New York rules were revised, Rules 30 and 31 were combined to make the present Rule 13, and the reasonable and plausible explanation of the present wording is that the words "with notice

of the property attached" were taken from old Rule 31 and were used to make Rule 13 harmonize with Rule 9, which required that "the names of the garnishees and the specific property in their hands shall be stated in the * * * process."

A comparison of the two rules will show that the California rule was copied verbatim, with the omission of the word "trustee," from the New York rule, and the statement in the preface to the District Court rules is further evidence of the same:

"The present rules in admiralty have likewise been framed upon the rules in admiralty of the Southern District of New York, adopted February 1, 1913, with such changes as our local practice seemed to justify."

(Preface to District Court Rules, p. v.)

The District Court was of the opinion that the change in the rules was to make the practice conform to the state practice of serving a separate notice of the property attached, and stated:

"This manner of service conforms both here and in New York to the manner of service of an attachment in each state. There are many decisions in each state holding that the giving of a notice of the property attached is essential to a valid garnishment."

(Apostles, p. 52.)

The state court decisions which are referred to in the opinion must be considered in connection with the state statutes relative to attachment. Section 540 of the California Civil Code of Procedure, provides:

"§ 540. Writ of attachment. If more than one defendant. The writ must be directed to the sheriff of any county in which property of such defendant may be, and must require him to attach and safely keep all the property of such defendant within his county not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand against such defendant; the amount of which must be stated in conformity with the complaint, unless such defendant give him security by the undertaking of at least two sufficient sureties in an amount sufficient to satisfy such demand against such defendant, besides costs, or in an amount equal to the value of the property of such defendant which has been or is about to be attached; in which case to take such undertaking."

This section does not require that the writ shall contain any mention of the garnishees or notice of the property to be attached.

The service of such a writ, without any additional notice, would not give a garnishee any information whatever except that the sheriff had been ordered to attach property of the defendant to the amount sued for. It is necessary, therefore, in order to give the garnishee information regarding the property attached, and to guide the sheriff in making a levy, that, in addition to the writ, a notice of the property attached be served upon the garnishee.

Section 542, Subd. 5, of the California Code of Civil Procedure, provides:

"5. Debts and credits and other personal property, not capable of manual delivery, *must* be attached by leaving with the person owing

such debts, or having in his possession, or under his control, such credits and other personal property, or with his agent, a copy of the writ, and a notice that the debts owing by him to the defendant, or the credits and other personal property in his possession, or under his control, belonging to the defendant, are attached in pursuance of such writ, except in the case of attachment of growing crops, a copy of the writ, together with a description of the property attached, and a notice that it is attached, shall be recorded the same as in the attachment of real property."

This section is quite different from the admiralty rule which holds that a sufficient service is made by leaving a copy of the process with notice of the property attached.

Similarly, Sec. 649 of the New York Code of Civil Procedure, Subd. 3, provides that property incapable of manual delivery may be attached

"by leaving a certified copy of the warrant and a notice showing the property attached with the person holding the same."

The process of foreign attachment in admiralty differs materially from the form of the state court writ. Admiralty Rule 9 of the District Court Rules, provides:

"Mesne process may be either in personam or in rem, or both, and shall be issued by the clerk. Process in personam may be: (1) a simple citation in the nature of a summons to appear and answer to the suit; (2) such a citation, with a clause therein that if the respondent cannot be found, his goods and chattels to the amount sued for be attached; (3) such a citation and attachment, together with a clause of

foreign attachment of the respondent's property and credits to the amount sued for in the hands of garnishees named therein. The names of the garnishees and the specific property in their hands shall be stated in the libel or petition and in the process, and the garnishees shall be cited to appear and answer on oath."

The marshal is directed by the process to attach specific property in the possession or under the control of garnishees named in the writ. No such provision is found in the state court process. It is apparent that when process of the form required by Rule 9, is served upon a garnishee named in the writ, that garnishee has actual notice of the property attached. It is therefore unnecessary that a separate and distinct notice, repeating the statements contained in the writ be also served upon the garnishee. The reason for the rule, the giving of notice to the garnishee, has been accomplished by the service of the writ. There is no reason for the service of an additional and separate notice, and, "when the reason of a rule ceases, so should the rule itself."

The notice which is required to be given is notice to the garnishee, and not notice to the respondents. The garnishee, Wolff, Kirchmann & Co., after having been served with the process of foreign attachment, answered as follows:

"That at the date the United States Marshal handed it a copy of the writ herein, it had no goods and chattels or credits and effects belonging to said W. R. Carpenter & Co., Ltd., a corporation, respondent in the above-entitled action, nor has it since had any; that said W. R. Carpenter & Co., Ltd., a corporation, owns

300 shares of stock of said Wolff, Kirchmann & Co., Inc., of a par value of \$100 each; that said shares of stock are fully paid up.

Dated, May 22, 1919."

(Apostles, p. 35),

and subsequently amended its answer by adding the following sentence:

"That at the time of the receipt of said copy of said writ the said W. R. Carpenter and Co., Ltd., appeared in the books and records of the said Wolff, Kirchmann and Co., Inc., as the owner of said 300 shares of stock.

Dated, July 10th, 1919."

(Apostles, p. 37.)

This answer shows conclusively that the garnishee had notice of the property attached, and which the libelants were seeking to attach by the service of the writ. There was no doubt in the mind of the garnishee, when the writ was served, that the marshal was levying upon credits and effects of the respondent in the custody or under the control of Wolff, Kirchmann & Co. The purpose of the notice had been fulfilled. The rule states that it is sufficient service "to leave a copy * * * with notice of the property attached." What clearer proof can be produced than the answer of the garnishee showing actual notice? We have pointed out that the writ conformed to the requirements of Rule 9 by naming the garnishee and the property which the marshal was directed to attach.

In view of the actual notice received by the garnishee as shown by its answer, we do not see how

it is open to respondent to come into court, represented by the same counsel who appeared for the garnishee, and more than two years after the writ was served, attack the service upon the ground that the garnishee had not received notice of the property attached.

We desire to call the court's attention to an affidavit by William Denman, Esq. (proctor for respondent), which was filed in support of the motion to dismiss the American Trading Company attachment. The affidavit states, in part:

"That at the time of said two attempted attachments or garnishments of credits of the respondent in the hands of the American Trading Company, the deputy marshal, Mr. Maguire, had never made such service, and did so in the absence of Mr. Burnham, chief deputy in charge of such services of the United States marshal's office in this District; that he was unfamiliar with the methods of said service, and did fail to serve any notice whatsoever of the credits attached at the time he handed to the representative of the American Trading Company the writ returned herein; that he was so unfamiliar with the acts constituting a proper service that he did not know how to make a return upon the writ: that on account of the absence of Mr. Burnham from the office, he delayed making his return for many months awaiting his advice as to the method of making the return; that the return in question was finally drafted, but antedated to the date of the attempted attachments; that the return was actually made by filing the writ with the clerk of the said court on or about the last of December, 1919, that is, over seven months after the time of the acts recited in the return."

(Apostles, p. 42.)

By counsel's own statement the alleged irregularity in the service of the writ was due to the fact that the deputy United States Marshal on duty was inexperienced and unfamiliar with the manner of serving process as counsel claims it should have been served. That is to say, libelants must suffer because an inexperienced officer of the court failed to give a particular *form* of notice, notwithstanding that the record clearly shows that the *substance* of the notice had been conveyed, and that the garnishee had actual notice and made an answer based upon such notice. The fact of actual notice has not been denied.

If the form of notice prescribed by the proctor for the respondent had been given, the result would have been exactly the same. It is a harsh rule, extremely unfair to libelants, and not within the spirit of admiralty practice, to hold that, under the circumstances, a separate form of notice should have been served, because a separate form is required by the state practice under a very different statute, and in connection with a different form of writ.

It must be conceded that the garnishee, upon receipt of a copy of the writ, had actual notice of the levy. This is borne out by the answers filed by the garnishee. The objection of counsel, therefore, is an objection to the form and not to the substance, and is a mere quibble over technicalities which is decidedly out of place in an admiralty cause.

Sec. 954, Revised Statutes provides:

"(Defects of form—amendments.) No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe."

This section is not confined to civil cases at law, but extends to all civil cases.

Dancel v. United States Shoe Machinery Co., 120 Fed. 839.

In re Griggs (C. C. A. 8th), 233 Fed. 243, the court held:

"The authority of the courts of the United States under section 954, Rev. Stat. (Comp. St. 1913, 1591), is of the very broadest character, and while it cannot be employed to supply a lack of jurisdiction it covers every step of a case from summons to judgment. McDonald v. Nebraska, 41 C. C. A. 278, 101 Fed. 171. The corresponding section of the Judiciary Act of 1789 (1 Stat. 91) 'was designed to free the administration of justice in the federal courts from all subtle, artificial and technical rules and

modes of proceeding in any way calculated to hinder and delay the determination of causes in those courts upon their very merits'." (p. 246.)

The libelants are entitled to have this cause determined according to the principles, rules and usages which belong to courts of admiralty:

"The jurisdiction of the admiralty rests upon the grant in the Constitution, and the terms in which that grant is extended to the respective courts of the United States. The forms and modes of proceeding in causes of admiralty and maritime jurisdiction are prescribed to the courts by the second section of the process act of 1792. In the process act of 1789, the language made use of in prescribing those forms implied a general reference to the practice of the civil law; but in the act of 1792, the terms employed are, "according to the principles, rules and usages, which belong to courts of admiralty, as contradistinguished from courts of common law."

Manro v. Almeida, 10 Wheat. 473; 6 L. Ed. 369, 372.

We have made a very careful search for authorities which might have a bearing on this cause, and all that we have found are in support of libelants' position. We have already discussed the case of Cushing v. Laird (supra), which holds that when the notice was contained in the body of the writ, service of the writ was sufficient.

In Gottesman v. Canada Atlantic & Plant S. S. Co. (D. C., E. D. New York), 246 Fed. 956, the court held:

"Application is made to vacate a writ of foreign attachment, upon the ground that the libelants did not comply with rule 7 of the United States Supreme Court Rules in Admiralty (29 Sup. Ct. XXXIX), and procure a special order of court for the issuance of the attachment.

It appears that an order was made by the court directing that process be issued to the marshal. Ordinarily, as set forth in Benedict's Admiralty, § 343, the judge, in order to pass upon the 'affidavit or other proof showing the propriety thereof', makes an indorsement upon the papers: 'Let process with writ of foreign attachment issue'. In the present case this indorsement was not placed upon the papers, and it is admitted for the purposes of the motion that no judge gave any special direction to the clerk for the making of the order, but that this was made in the usual form by the clerk, as if such direction had been given. It was admittedly too late to issue a new process when the matter was called to the attention of the court, inasmuch as by that time the respondent had appeared by attorney and could therefore be found in the district. Birdsall v. Germain Co. (D. C.), 227 Fed. 953.

When the point was called to the court's attention, an order was made by the District Judge denying an oral application to vacate the attachment. This court held that a special order had been made, and that the court could sanction the action of the clerk after as well as before the issuance of process, since the facts made it appear that the court was actually in session at the time the special order was entered upon the minutes, and that the clerk was following the usual practice of the court as to the jurisdictional facts upon which a judge would have directed the entry of the order, if it had been

brought to his personal attention. Bryan v. Ker, 222 U. S. 107; 32 Sup. Ct. 26; 56 L. Ed. 114."

In *The Horsa* (D. C., So. Car.), 232 Fed. 993, a libel *in personam* was filed against the owners of the steamship "Horsa" and a *monition in rem* was issued, under which the vessel was attached, being released later upon giving bond.

The respondent thereafter moved to dissolve the attachment upon the ground that the process was not in the form prescribed by the Admiralty Rules of the Supreme Court. The court said (pp. 996-7):

"Whilst the form of the process is not in artistic form, yet it complied in the opinion of the court substantially with the requirements of rule 2 of the Rules in Admiralty. The vessel was seized, and the owners were notified by the marshal, and have appeared to the proceedings. This is in effect exactly what would have resulted if the form had been different, and it had run in the shape of a warrant of arrest of the person of the defendants, with a clause that, if they could not be found, their goods and chattels should be attached to the amount sued for."

"To dissolve the attachment simply because the process in this case was not in the form in exact words of first directing the persons of the defendants to be arrested, and then following that with a clause, if they could not be found, to attach their goods and chattels, when there now is in the court the bond of the defendants, in consideration of which they secured the release of the vessel, that they would abide by the decree of the court, would be practically to deprive the plaintiff of all remedy. The vessel has gone, its owners are citizens of a dif-

ferent country, the vessel is without the jurisdiction, the owners are not themselves, and have no known property, in the jurisdiction, and to dissolve the attachment at this time would be to deprive the party injured of all remedy, when in reality the respondents have had full process and opportunity to be brought into and have their day in court."

These two cases turn upon the validity of attachment process in admiralty when there has been a failure to comply literally with the rules. In "The Horsa" a monition in rem was served instead of a writ of foreign attachment, yet the court refused to set aside the service.

The reasoning in that case is particularly applicable to the cause at bar. Note: "This is in effect exactly what would have resulted if the form had been different." So, in this cause, if a separate notice had been handed by the deputy marshal to the garnishee, containing a repetition of the information set forth in the writ, the result would have been exactly the same. The garnishee would have been none the wiser. His counsel would have made the same answer that was made to the present writ. How would the result have been different?

"To dissolve the attachment simply because the process in this case was not in the form " * * would be practically to deprive the plaintiff of all remedy. The vessel has gone, its owners are citizens of a different country, the vessel is without the jurisdiction, the owners are not themselves, and have no known property, in the jurisdiction, and to dissolve the attachment at this time would be to deprive the party injured of all remedy."

Every word of the above applies to the situation of the appellants in this cause. And stronger yet: for the respondent waited more than two years before taking a step against the attachment.

Will this court sanction such an unprecedented departure from the principles, rules and usages of the courts of admiralty, in a matter of mere form, to the irreparable injury of the appellants?

It is respectfully submitted that the order of the District Court quashing the service of the attachment upon Wolff, Kirchmann & Co., garnishee, should be reversed; and the cause be remanded to the District Court for a hearing upon the merits.

Dated, San Francisco, February 8, 1922.

Andros & Hengstler,
Louis T. Hengstler,
F. W. Dorr,
Proctors for Appellants.





